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Supreme Court, U.S.
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No. 95 428 SEP 5 - 1995

OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1995

CITY OF COLORADO SPRINGS AND CITY OF AURORA, COLORADO, MUNICIPAL CORPORATIONS,

Petitioners,

v.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF EAGLE, STATE OF COLORADO, et al.,

Respondents.

Petition For A Writ Of Certiorari To The Colorado Court Of Appeals

APPENDIX TO PETITION FOR WRIT OF CERTIORARI, VOLUME II, Pages 157a to 319a

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INDEX TO APPENDICES

VOLUME I

Appendix A: The decision of the Colorado Court of Appeals reported at 895 P.2d 1105 (1994). App. 1a-33a.

Appendix B: Relevant Portions of the FLPMA permit issued for the Homestake Water Project ("Project") by the United States Forest Service. App. 34a-107a.

Appendix C: Relevant portions of the Section 404 permit issued for the Project by the U.S. Army Corps of Engineers. App. 108a-134a.

Appendix D: The decision of the Colorado Water Quality Control Division certifying that the Project met all applicable state water quality requirements. App. 135a-141a.

Appendix E: The resolution of the Eagle County Board of County Commissioners ("County"), dated February 22, 1988, denying the local land use permits for the Project. App. 142a-156a.

VOLUME II

Appendix F: The resolution of the Eagle County Board of County Commissioners ("County"), dated December 17, 1991, denying the local land use permits for the Project. App. 157a-161a.

Appendix G: The order of the Eagle County District Court dated July 22, 1988, dismissing for lack of standing the claims of the cities brought under the Fifth and Fourteenth

Amendments to the United States Constitution. App. 162a-167a.

Appendix H: The order of the Eagle County District Court dated July 22, 1988, dismissing for lack of standing the claims of the cities brought under the Fifth and Fourteenth Amendments to the United States Constitution. App. 168a-172a.

Appendix I: The initial decision of the Eagle County District Court remanding the case to the Board of County Commissioners. App. 173a-191a.

Appendix J: The decision of the Eagle County District Court finding that the County had denied the cities' due process and acted in an arbitrary and capricious manner in denying the requested permits. App. 192a-206a.

Appendix K: The order of the Eagle County District Court vacating that portion of its prior decision which had required the County to issue the permits. App. 207a-212a.

Appendix L: The Colorado Court of Appeals decision denying the cities Petition for Rehearing. App. 213a.

Appendix M: The Colorado Supreme Court decision denying the cities' Petition for Writ of Certiorari. App. 214a-216a.

Appendix N: Relevant portions of the pleadings and briefs below indicating the manner in which the federal questions were raised App. 217a-269a.

Appendix O: Relevant provisions of the Colorado Land Use Act, C.R.S. §§ 24-65.1-101-502 (1988) are attached as App. 270a-279a.

Appendix P: Relevant provisions of the Eagle County land use regulations promulgated pursuant to C.R.S. § 24-65.1-101-502 (1988) are attached as App. 280a-295a.

Appendix Q: Relevant provisions of the Federal Land Policy Management Act, 43 U.S.C. § 1700-1784 (1986), are attached as App. 296a-300a.

Appendix R: Relevant provisions of the National Forest Management Act, 16 U.S.C. §§ 472a, 476 note, 500, 513, 515, 516, 518, 521b, 528 note, 576b, 581h, 594-2 note, 1600 note, 1600-1614 (1985), are attached as App. 301a-303a.

Appendix S: Relevant provisions of the Organic Act of 1897, 16 U.S.C. §§ 475-481 (1985), are attached as App. 304a-305a.

Appendix T: Relevant provisions of the Multiple Use and Sustained Yield Act, 16 U.S.C. §§ 528-531 (1985), are attached as App. 306a-307a.

Appendix U: The text of the Property Clause of the United States Constitution, art. IV, § 3, cl. 2, is set forth at App. 308a.

Appendix V: The text of the Fifth and Fourteenth Amendments to the United States Constitution are attached as App. 309a-311a.

Appendix W: The text of the Supremacy Clause of the United States Constitution, art. VI, cl. 2, is set forth at App. 312a.

Appendix X: Relevant portions of P.L. 96-560, 94 Stat. 3266 (1980) are attached as App. 313a.

Appendix Y: Relevant portions of the Code of Federal Regulations, 1983 edition, governing the use of federal lands, 36 C.F.R. Part 200 through 299, are set forth at App. 314a-318a.

Appendix Z: Map of Homestake Delivery System is attached as App. 319a.

APPENDIX F

Commissioner GUSTAFSON moved adoption of the following Resolution:

BOARD OF COUNTY COMMISSIONERS
COUNTY OF EAGLE, STATE OF COLORADO

RESOLUTION NO. 91-104

REGARDING THE ORDER REMANDING PERMIT APPLICATION CONSIDERATION
HOMESTAKE WATER DIVERSION PROJECT, PHASE II

WHEREAS, the Cities of Colorado Springs and Aurora (hereinafter the "Cities" or the "Applicant") submitted a consolidated application for the construction of the second of four phases of a water diversion project commonly referred to as the Homestake Water Diversion Project; and

WHEREAS, after public hearing, said consolidated application was denied by the Eagle County Board of County Commissioners (the "Board") pursuant Resolution 88-15; and

WHEREAS, said denial is the subject of an appeal under C.R.C.P. 106 to the Eagle County District Court, Case No. 88 CV 142; and

WHEREAS, the Court received cross motions for Summary Judgment; and

WHEREAS, on July 2, 1991, the Eagle County District Court, among other rulings, ordered the applications for a Permit for a Major Extension of a Water Project, for a Permit for Efficient Utilization of Municipal Water Project, and for the Special Use Permit, remanded to the

Eagle County Board of Commissioners for reconsideration in conformance with the Court's written order of that date; and

WHEREAS, the Court determined that any reliance upon certain findings of fact made by the Board under 6.04.15.1.p, 6.04.15.1.1, 6.04.15.1.b, 6.05.15.1.b of the Eagle County administrative regulations, was improper; and

WHEREAS, with regard to the application for a Special Use Permit, the Court determined that any reliance upon certain findings of fact made by the Board under the Special Use Permit criteria 2.09.02.13.f, 2.09.04.1.a, and 2.09.04.1.b, was improper; and

WHEREAS, upon proper notice, the Board held hearings pursuant to said remand on October 21, 1991 and November 25, 1991; and

WHEREAS, the Cities moved for the submission of and inclusion of certain federal agency documents into the record of the decision; and

WHEREAS, the Board allowed and received legal arguments by the parties regarding whether the criteria for approval, as limited by the Court's July 2, 1991 order, were satisfactorily met by the evidence and testimony presented with the application; and

WHEREAS, the Board deliberated upon the issue of whether the criteria for approval, as limited by the Court's July 2, 1991, order, were satisfactorily met by the evidence and testimony presented with the application.

NOW, THEREFORE, BE IT RESOLVED BY THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF EAGLE, STATE OF COLORADO:

THAT, the record of testimony and evidence used in the consideration of the application is closed and shall not be reopened.

THAT, the Cities' motion for the submission of and inclusion of certain federal agency documents be denied.

THAT, with regard to the application for a Permit for a Major Extension of a Water Project, Section 6.04.15.2 of Eagle County's administrative regulation entitled "Major Extensions of Existing Domestic Water and Sewage Treatment Systems" states that "(t)he permit shall be denied if the applicant fails to satisfy all the criteria outlined in Subsection 6.04.15.1."

THAT, with regard to the application for a Permit for Efficient Utilization of Municipal Water Project, Section 6.05.15.2 states that "(t)he permit shall be denied if the applicant fails to satisfy all the criteria outlined [within 6.05.15.1]."

THAT, in light of the requirements of Sections 6.04.15.2 and 6.05.15.2 of the administrative regulations, and the remaining finding of fact within Sections I and II of the Findings of Fact in the Resolution 88-15, the Board hereby reaffirms its denial of the application of the Cities for the following designated activities of state interest:

A. Major extension of an existing water collection system (Section 6.04); and

B. Efficient utilization of a municipal water project (Section 6.05).

THAT, there remain certain critical findings listed within Section III of the Findings of Fact in the Resolution 88-15, specifically:

"3. (2.09.02.13.e) The Project may adversely affect fish, wildlife or migratory ranges.

4. (2.09.02.13.e) Evidence presented at the hearing failed to demonstrate that the adverse effects on fish, wildlife or migratory ranges can be adequately mitigated."

THAT, in light of the remaining critical findings of fact within Section III of the Findings of Fact in the Resolution 88-15, the Board hereby reaffirms its determination that the Applicant has failed to satisfy the criteria of Section 2.09 and therefore reaffirms its denial of the application of the Cities for a Special Use Permit.

THAT, this resolution and the related deliberations have been undertaken, notwithstanding any objections the Board may have to the Court's ruling as to the authority of the Board to consider, regulate, and deny this application, in an effort to comply with the remand of the Court. The Board reserves all rights of appeal and shall not be estopped by the passage of this resolution from arguing on appeal its authority in excess of the limits placed upon it under the remand.

The Board finds, determines and declares that this Resolution is in the best interests of the health, safety and welfare of the County of Eagle, State of Colorado.

MOVED, READ AND ADOPTED by the Board of County Commissioners of the County of Eagle, State of Colorado, at its regular meeting held the 17th day of December 1991.

[seal]

/s/ Johnette Phillips
Clerk to the Board
of County
Commissioners

COUNTY OF EAGLE,
STATE OF COLORADO,
By and Through Its
BOARD OF COUNTY
COMMISSIONERS

By: /s/ George A. Gates
George A. Gates,
Chairman

/s/ Richard L
Gustafson
Richard L.
Gustafson,
Commissioner

/s/ Donald H. Welch
Donald H. Welch,
Commissioner

Commissioner ___ seconded adoption of the foregoing resolution. The roll having been called, the vote was as follows:

Commissioner George A. Gates ___
Commissioner Richard L. Gustafson ___
Commissioner Donald H. Welch ___

This Resolution passed by ___ vote of the Board of County Commissioners of the County of Eagle, State of Colorado.

APPENDIX G

DISTRICT COURT, COUNTY OF EAGLE, STATE OF COLORADO
Civil Action No. 88 CV 142

ORDER

CITY OF COLORADO SPRINGS and CITY OF AURORA, Colorado Municipal Corporations,

Plaintiffs,

vs.

1. THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF EAGLE, STATE OF COLORADO;
2. GEORGE A. GATES, DONALD H. WELCH, RICHARD L. GUSTAFSON, in their official capacities as individual members of said Board;
3. THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF EAGLE, STATE OF COLORADO, in its capacity as the permitting authority under Section 24-65.1-101, *et seq.*, C.R.S.;
4. THE EAGLE COUNTY PLANNING COMMISSION;
5. CHARLES RIDGWAY, DAVID SLEMON, DENNIS GELVIN, DONALD PRICE, in their official capacities as individual members of said Commission;
6. THE COUNTY OF EAGLE, STATE OF COLORADO;
7. AVON METROPOLITAN DISTRICT;
8. TOWN OF AVON, COLORADO;
9. COLORADO COUNCIL OF TROUT UNLIMITED;
10. COLORADO RIVER OUTFITTERS ASSOCIATION;

DIVISION OF WILDLIFE, STATE OF COLORADO;
EAGLE COUNTY SHERIFF, in his official capacity;
HOLY CROSS WILDERNESS DEFENSE FUND;
JAMES FRANKLIN LAMONT;
RED CLIFF WATER AND SANITATION DISTRICT;
TOWN OF EAGLE, COLORADO;
TOWN OF GYPSUM, COLORADO'
TOWN OF MINTURN, COLORADO;
TOWN OF RED CLIFF, COLORADO;
TOWN OF VAIL, COLORADO;
UPPER EAGLE REGIONAL WATER AUTHORITY;
UPPER EAGLE VALLEY SANITATION DISTRICT;
VAIL VALLEY CONSOLIDATED WATER DISTRICT;
VAIL ASSOCIATES, INC.; and
EAGLE COUNTY HISTORICAL SOCIETY,

Defendants.

THE COURT, having considered the Motion to Dismiss Plaintiffs' Sixth, Twelfth and Thirteenth claims filed by Defendants Board of County Commissioners of the County of Eagle; George A. Gates, Donald H. Welch, and Richard L. Gustafson, in their official capacities as individual members of said Board; The Board of County Commissioners of the County of Eagle, in its capacity as the permitting authority under Section 24-65.1-101 *et seq.*, C.R.S.; The Eagle County Planning Commission; Charles Ridgway, David Slemon, Dennis Gelvin, and Donald

Price, in their official capacities as individual members of said Commission; and The County of Eagle, hereinafter collectively referred to as "Eagle County" or "Defendants", and the Response and Reply thereto, along with the pleadings and exhibits appended to these documents,

AND BEING fully advised in the premises, enters the following findings and Order:

1. Defendants move the Court to dismiss Plaintiffs' (the Cities') Sixth, Twelfth and Thirteenth claims for relief wherein Plaintiffs, municipal corporations of the State of Colorado, allege that they have been denied due process by Eagle County in contravention of the Fifth and Fourteenth amendments of the United States Constitution. Eagle County argues the following:

a. Plaintiffs lack standing to assert their Sixth and Twelfth clams [sic] for relief because municipalities are not afforded due process protection under the United States Constitution; and

b. Plaintiffs lack standing to assert their Thirteenth claim for relief because municipalities are not afforded statutory protection under 42 U.S.C. 1983.

2. Plaintiffs respond arguing that:

a. Plaintiffs have standing to assert their Sixth and Twelfth claims as home rule municipalities in their capacity as owners of certain decreed conditional water rights;

b. The "per se" exclusionary rule on standing, as developed by the federal courts, should not apply, and does not apply to Colorado home rule municipalities;

c. Colorado courts have found standing to exist under the United States and Colorado Constitutions when considering procedural due process issues;

d. Plaintiffs have standing in their proprietary capacity;

e. There exists a basis for Plaintiffs' Sixth Claim outside of the Federal and State Constitutions; and

f. Plaintiffs have standing to assert their Thirteenth Claim under 42 USC 1983.

3. Defendants reply they are not moving to dismiss all of Plaintiffs' claims, and agree the Cities have standing to bring their action under Rule 106(a)(4) or Rule 57. Defendants argue the Colorado Supreme Court's recent decision in *Orchard City v. Delta County Commissioners*, 751 P.2d 1003 (Colo. 1988) is dispositive of the issues raised, and the governmental/proprietary distinction has never been recognized in the context of Fourteenth Amendment rights. *See City of Trenton v. State of New Jersey*, 262 U.S. 182 (1923).

4. Plaintiffs' Sixth, Twelfth and Thirteenth Claims for Relief are summarized as follows:

a. Sixth Claim – Seeks a declaratory judgment that the regulations adopted by the Board of County Commissioners are legally insufficient and vague as to deny Plaintiffs due process under the Fifth and Fourteenth Amendments of the U.S. Constitution and Article II, Section 25 of the Colorado Constitution;

b. Twelfth Claim – Seeks a declaratory judgment that the findings and conclusions as set forth in the Board's Resolution No. 88-15 are without factual support

in the record; that Plaintiffs were not afforded the right of cross examination and rebuttal as to all evidence considered by the Board; that the Board was impermissibly biased against Plaintiffs and the project; and that the Board applied an unduly oppressive criteria to the permitting of the project, all of which denied Plaintiffs due process in the hearing process; and

c. Thirteenth Claim – Seeks an injunction due to Defendants' arbitrary denial of Plaintiffs application enjoining Defendants from depriving Plaintiffs of their constitutionally protected property rights of developing their water rights pursuant to 42 USC 1983.

5. The Court finds that the Plaintiffs, City of Colorado Springs and City of Aurora, are municipal corporations and, as such, are not citizens within the meaning of the Fourteenth Amendment. As the State Supreme Court held in *Orchard City v. Delta County Commissioners*, 751 P.2d 1003, 1006 (Colo. 1988), "being but creatures of the State, municipal corporations have no standing . . . to invoke the provisions of the Fourteenth Amendment of the Constitution in opposition to the will of their creator. . . . [T]he Fourteenth Amendment simply does not prescribe guidelines and impose restrictions upon one political subdivision vis-a-vis another political subdivision." *Orchard City*, at 1006, fn.3; *South Macomb Disposal v. Township of Washington*, 790 F.2d 500, 503 (6th Cir. 1986).

6. The Cities therefore have no standing to assert purported constitutionally protected property rights in a 42 USC 1983 claim.

7. The Court further finds a political subdivision of a state cannot challenge the constitutionality of another

political subdivision's ordinance on due process grounds. The Fourteenth Amendment does not prescribe guidelines or impose restrictions upon one political subdivision of a state vis-a-vis another political subdivision of the state; and the relationship between the entities is a matter of state concern. The Fourteenth Amendment protections and limitations do not apply in this instance either. *South Macomb, supra.,* at 505.

8. The Court therefore grants Defendants' Motion in part and properly dismisses Plaintiffs' Sixth and Thirteenth Claims for Relief but denies Defendants' Motion as to the Twelfth Claim.

DONE AND SIGNED this 22nd day of July, 1988.

BY THE COURT:

/s/ Wm L Jones
Wm. L. Jones, Chief Judge
District Court

APPENDIX H

DISTRICT COURT, COUNTY OF EAGLE, STATE OF COLORADO
Civil Action No. 88 CV 142

ORDER

CITY OF COLORADO SPRINGS and CITY OF AURORA, Colorado Municipal Corporations,

Plaintiffs,

vs.

1. THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF EAGLE, STATE OF COLORADO;
2. GEORGE A. GATES, DONALD H. WELCH, RICHARD L. GUSTAFSON, in their official capacities as individual members of said Board;
3. THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF EAGLE, STATE OF COLORADO, in its capacity as the permitting authority under Section 24-65.1-101, *et seq.*, C.R.S.;
4. THE EAGLE COUNTY PLANNING COMMISSION;
5. CHARLES RIDGWAY, DAVID SLEMON, DENNIS GELVIN, DONALD PRICE, in their official capacities as individual members of said Commission;
6. THE COUNTY OF EAGLE, STATE OF COLORADO;
7. AVON METROPOLITAN DISTRICT;
8. TOWN OF AVON, COLORADO;
9. COLORADO COUNCIL OF TROUT UNLIMITED;
10. COLORADO RIVER OUTFITTERS ASSOCIATION;

11. DIVISION OF WILDLIFE, STATE OF COLORADO;
12. EAGLE COUNTY SHERIFF, in his official capacity;
13. HOLY CROSS WILDERNESS DEFENSE FUND;
14. JAMES FRANKLIN LAMONT;
15. RED CLIFF WATER AND SANITATION DISTRICT;
16. TOWN OF EAGLE, COLORADO;
17. TOWN OF GYPSUM, COLORADO'
18. TOWN OF MINTURN, COLORADO;
19. TOWN OF RED CLIFF, COLORADO;
20. TOWN OF VAIL, COLORADO;
21. UPPER EAGLE REGIONAL WATER AUTHORITY;
22. UPPER EAGLE VALLEY SANITATION DISTRICT;
23. VAIL VALLEY CONSOLIDATED WATER DISTRICT;
24. VAIL ASSOCIATES, INC.; and
25. EAGLE COUNTY HISTORICAL SOCIETY,

Defendants.

THE COURT, having considered the Plaintiffs Motion to Amend Complaint, the Response and Reply thereto, along with the pleadings and exhibits appended thereto,

AND BEING fully advised in the premises, enters the following findings and Order:

1. Plaintiffs (Cities) move the Court for leave to amend their Complaint filed March 18, 1988, such amendment proposing the addition of a Fourteenth and Fifteenth Claim for Relief.

2. The Fourteenth Claim is a demand for repayment to Plaintiffs of an application "fee" which Plaintiffs' allegedly paid to Eagle County in the amount of $191,478.44 under protest. Plaintiffs claim the application "fee" assessed pursuant to Eagle County Land Use Regulation Section 6.01.23 and C.R.S. 24-65.1-501(1)(a) includes amounts not contemplated by C.R.S. 24-65.1-501(1)(a) and was not set within the required ten days of the County's receipt of Plaintiffs' application to develop water rights it owns within the county. Plaintiffs further claim in their motion to amend that the County was given notice on March 16, 1988 by Plaintiffs that the payment was made under protest, it was improperly assessed and they demanded return with interest. Plaintiffs also claim no response has been received from the County regarding their demand.

3. The Eagle County Defendants (captioned above as Defendants 1. through 6.) respond that the proposed Fourteenth Claim seeking declaratory relief is an entirely new claim and is untimely even if it seeks a declaratory judgment since it was not brought within the 30 day limitation contained in Rule 106(b). *Citing Greyhound Racing Association v. Colorado Racing Commission,* 589 P.2d 70 (Colo. App. 1978).

4. The Court notes the Eagle County Defendants argument that failure to appeal within the applicable 30 day time limit is a jurisdictional defect, and that a Plaintiff cannot circumvent these time limitations by attempting to obtain declaratory relief. *See Trinen v. City and County of Denver,* 725 P.2d 65 (Colo.App. 1986); *Snyder v. City of Lakewood,* 542 P.2d 371, 376 (Colo. 1975); and

Greyhound Racing Association of Southern Colorado, Inc. v. Colorado Racing Commission, 589 P.2d 70 (Colo.App. 1978).

5. However, the Court finds when a petition for review under Rule 106(a)(4) is *timely* filed, the Court of Appeals has followed a different line of cases than *Trinen, Greyhound* and *Snyder*. When a petition for review is timely filed under the rule, public policy requires the joinder of all claims for relief in one action. *See Powers v. Board of County Commissioners*, 651 P.2d 463, 464 (Colo.App. 1982), distinguishing *Snyder; Norby v. City of Boulder*, 577 P.2d 277 (1978); and *Wilson v. Town of Avon*, 749 P.2d 990, 992 (Colo.App. 1987). And a trial court errors by deyning [sic] leave to amend a Rule 106(a)(4) petition adding a claim for declaratory relief on a money demand issue which was not heard nor within the jurisdiction of the inferior tribunal. *See Wilson, supra.* at 992.

6. The Court thus grants Plaintiffs' Motion to Amend adding the Fourteenth Claim for Relief.

7. The Court next addresses the Plaintiffs proposed Fifteenth Claim. The Court finds the Cities proposed Fifteenth Claim alleges the deprivation of a constitutionally protected property interest of the Cities and seeks just compensation which is similar to the issues presently before the Court in the Eagle County Defendants' Motion to Dismiss Plaintiffs Sixth, Twelfth and Thirteenth Claims for Relief. The Court concludes, as it has on even date herewith in its Order dismissing Plaintiffs originally filed Six and Thirteenth claims, that municipal corporations are creatures of the State and

have no standing to invoke the protections of the Fourteenth or Fifth Amendments to the Constitution in opposition to the will of their creator. In other words, the Fourteenth and Fifth Amendments simply do not prescribe guidelines and impose restrictions upon one political subdivision vis-a-vis another political subdivision. *Orchard City v. Delta County Commissioners,* 751 P.2d 1003, 1006 (Colo. 1988); *Village of Arlington Heights v. Regional Transportation Authority,* 653 F.2d 1149 (1981); and *See Generally,* 16A Am.Jur.2d Constitutional Law, Section 744.

8. The Court thus denies Plaintiffs' Motion to Amend which proposes the addition of Plaintiffs' Fifteenth Claim because the Court has found that municipal corporations have no standing to bring constitutional claims against the state or another of the state's political subdivisions. *Arlington, supra.* at 1153.

DONE AND SIGNED this 22nd day of July, 1988.

BY THE COURT:

/s/ Wm L Jones
Wm. L. Jones, Chief Judge
District Court

APPENDIX I

DISTRICT COURT, EAGLE COUNTY, COLORADO

Case No. 88 CV 142

ORDER REMANDING PERMIT APPLICATION CONSIDERATION TO THE BOARD OF COUNTY COMMISSIONERS

CITY OF COLORADO SPRINGS AND CITY OF AURORA,
Colorado municipal corporations,

Plaintiffs,

v.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF EAGLE, STATE OF COLORADO; *et al.*

Defendants.

THIS MATTER comes before the Court on cross motions for Summary Judgment in this Rule 106 action. The Court has reviewed the motions, responses, replies and exhibits, and being fully advised, makes the following findings of fact:

Factual Background

The Cities of Colorado Springs and Aurora ("Cities") are owners of decreed water rights in Eagle County. Cities are home-rule municipalities with charter provisions allowing extra-territorial construction, maintenance, and operation of waterworks. A portion of such water rights were developed through Phase I of the

Homestake Project, completed in 1966. Phase I of the Homestake Project was designed to accommodate additional flows to be developed at a later date.

The diversion sites for Phase II of the Homestake Project ("Project") are located entirely on United States Forest Service lands. These lands were designated by Congress in 1980 as the Holy Cross Wilderness. At the time of the designation as a wilderness, the Cities received a comprehensive statutory exemption allowing for the development of their previously existing water rights.

In the course of developing the Project, the Cities proceeded through a review process under the National Environmental Policy Act ("NEPA"). Eagle County participated in the NEPA proceedings. As part of the NEPA procedures, an Environmental Impact Statement ("EIS") was prepared.

The Cities also sought a land use permit from the U.S. Forest Service under the provisions of the Federal Land Policy Management Act ("FLPMA"). The FLPMA permit was granted with conditions addressing environmental and land use concerns.

The Cities were also granted a section 404 permit from the Army Corps of Engineers pursuant to the federal Clean Water Act. The 404 permit for dredge and fill activities contained conditions to mitigate environmental damage.

On May 20, 1985, the Cities applied to the Eagle County Board of County Commissioners ("Board") for approval of the Project as a major extension of an existing

water project, efficient utilization of an existing water systems, location approval pursuant to CRS 30-28-110, and a Certificate of Designation pursuant to 30-20-101 *et seq.* ("Application").

The Application was reviewed for completeness by the Eagle County Planning Department. On July 23, 1985, the Planning Department found the Application incomplete. The Cities resubmitted the Application with supplemental materials on January 2, 1986. The Planning Department found the Application complete on March 11, 1987, pending receipt of additional information, subsequently provided.

Public hearings were held on the Application on April 20-April 24, 1987, May 14-May 16, 1987, May 18-May 20, 1987 and September 9, 1987.

The Eagle County Planning Commission, in Resolution No. 88-15, recommended approval of the Application subject to compliance with certain conditions. The Cities stipulated that they did not want the Board of County Commissioners to consider any alternatives, except that presented in the Application. On February 22, 1988, the Eagle County Board of County Commissioners unanimously voted to deny the Cities' Application.

Procedural Background

A complaint was filed in this action by the Cities on March 18, 1988. The original complaint contained twelve claims for relief; an amended complaint filed June 22, 1988 asserted two additional claims.

By Order dated July 22, 1988, the Court, pursuant to defendant County of Eagle ("County") motion, dismissed plaintiffs' Sixth and Thirteenth Claims and disallowed the amendment adding the Fourteenth Claim. Consequently, there are eleven remaining claims in this action.

The following original defendants have been dismissed from this action: Colorado Council of Trout Unlimited; Division of Wildlife, State of Colorado; James Franklin Lamont; Town of Vail, Colorado; Upper Eagle Regional Water Authority; Upper Eagle Valley Sanitation District; and Vail Associates, Inc.

The following original defendants have filed a Disclaimer in this action: Town of Minturn, Colorado; and Eagle County Historical Society.

The following original defendants have indicated, by letters to the Court, that they do not wish to participate in this action: Red Cliff Water and Sanitation District; and Town of Red Cliff, Colorado.

The following original defendants have filed no answer to the complaint; Colorado River Outfitters Association; Eagle County Sheriff, in his official capacity; and the Town of Gypsum, Colorado.

The remaining claims are as follows:

First Claim: Sections 24-65.1-101 *et seq.* are unconstitutional insofar as they attempt to vest counties with authority to regulate or deny construction of waterworks by home rule municipalities.

Second Claim: Construction of the Project is a local, municipal concern and the Charters of the Cities supersede the statutes and regulations relied upon by the Board in denying their permits.

Third Claim: CRS Sec. 24-65, 1-101 *et seq.* constitutes an unlawful delegation of authority over municipal waterworks to county commissions.

Fourth Claim: The provisions of CRS Sec. 24-65.1-101 *et seq.* and CRS 30-20-103 are each void as an impermissible delegation of authority of matters of state-wide concern to local governments.

Fifth Claim: Plaintiffs are acting as a public utility, and as such are exempt from the provisions of Sec. 24-65.1-101 *et seq.*

Sixth Claim: Dismissed.

Seventh Claim: Plaintiffs are acting as a public utility in the construction of the project under CRS 30-28-110 and the provisions of that statute supersede any regulatory authority over the Project bestowed upon Eagle County by CRS Sec. 24-65.1-101 *et seq.*

Eighth Claim: The Board has exceeded its jurisdiction in attempting to regulate the Project.

Ninth Claim: The Board acted in an arbitrary and capricious fashion and abused its discretion by specific actions in denying the Permits.

Tenth Claim: The Board acted in an arbitrary and capricious fashion and abused its discretion by denying plaintiffs' permits in the face of a complete and accurate

Application, supplemented with hearing testimony and exhibits, which all met lawful criteria.

Eleventh Claim: By virtue of its attempt to regulate the Project and deny permits, the Board has acted outside the scope of its jurisdiction and in violation of the provisions of CRS 31-35-402(1).

Twelfth Claim: Plaintiffs have been denied due process under the United States and Colorado Constitutions by specific acts of the Board.

CONCLUSIONS OF LAW

The Court makes the following Conclusions of Law:

Issues raised in plaintiff's first, second, third, fourth, fifth and seventh claims have been addressed by the Colorado Supreme Court in *City and County of Denver v. Board of County Commissioners of Grand County.* 782 P.2d 753 (Colo. 1989) (*"Grand County"*). In *Grand County,* a municipality brought an action seeking a declaration that it need not obtain permits from Grand and Eagle Counties to construct and operate water collection and diversion facilities in Grand and Eagle Counties. In affirming summary judgments entered in favor of the Counties, the Supreme Court discussed the following issues, which effectively dispose of many of plaintiffs' claims:

Plaintiffs' First Claim

Plaintiffs' first claim contends that certain provisions of CRS 24-65-101 *et seq.* ("Land Use Act") constitute unconstitutional regulation of the powers of a home rule municipality. The court in *Grand County* held the Land

Use Act does not infringe on the exercise of a home-rule municipalities powers in violation of Article XX of the Colorado constitution, 782 P.2d at 761, 762.

Therefore, the Court concludes that plaintiff's first claim for relief is without merit as a matter of law.

Plaintiffs' Second Claim

Plaintiffs' second claim contends that construction of the Homestake II Project ("Project") is a local, municipal concern of the City of Colorado Springs and the City of Aurora under the state constitution, which supersedes conflicting state law. Article XX, Section 6 of the Colorado Constitution provides, in part,:

> The people of each city or town of this state, having a population of two thousand . . . are hereby vested with, and they shall always have, power to make, amend, add to or replace the charter of said city or town, which shall be its organic law and extend to all its local and municipal matters.
>
> Such charter and the ordinances made pursuant thereto in such matters shall supersede within the territorial limits and other jurisdiction of the city or town any law of the state in conflict therewith.

Construction of a municipal water project outside the territorial limits of the municipality is a matter of mixed state and local concern. *Grand County* at 763. The Court concludes that the Homestake II Project is a municipal water project to be constructed outside the territorial limits of the plaintiff municipalities. The powers of a

home-rule municipality in constructing an extra-territorial water project do not supersede applicable state law. *Id.* Consequently, the Court concludes that plaintiffs' second claim is without legal merit.

Plaintiffs' Third Claim

Plaintiff's third claim contends that the Land Use Act constitutes an unlawful delegation of authority over municipal matters to counties. The grant of power concerning regulation of activities of state interest in the Land Use Act does not unconstitutionally delegate legislative authority to local governments. *Grand County* at 760. The Court has previously concluded that the Homestake II Project is an activity of mixed state and local concern. Therefore, the Court concludes that plaintiffs' third claim is legally without merit.

Plaintiffs' Fourth Claim

Plaintiffs' fourth claim contends that CRS 24-65.1-101 of the Land Use Act and CRS 30-20-103, which requires a county permit for a solid waste disposal project, represent an unconstitutional delegation of matters of statewide concern to local entities. In matters of statewide concern, enactments of the General Assembly take precedence over enactments of home-rule cities. *Grand County* at 762. The legislature, acting in the interest of the state, has developed a detailed statutory scheme in areas and activities of state interest which has been held to apply to the construction of extra-territorial municipal water projects. As such, the Land Use Act prescribes the procedure by which construction of municipal water projects located

outside of the territorial limits of the municipality are regulated. The procedures established in the Land Use Act prevent uncontrolled exercises of discretionary power by local governments. *Grand County* at 760. Therefore, the Court concludes that the Land Use Act does not result in an unconstitutional delegation of the state's powers to the counties.

CRS 30-20-103 provides, in pertinent part,:

> Any person desiring to operate a solid wastes disposal site and facility within the unincorporated portion of any county shall make application to the board of county commissioners of the county in which such site or facility is or is proposed to be located for a certificate of designation. . . .

The statute further provides that approval will be based on criteria established by the state board of health, the water quality control commission and air quality control commission. Other sections of the Solid Wastes Act provide detailed procedures and criteria for the board to use in determining whether to grant a permit. The Solid wastes Act delegation procedures do not violate the Colorado constitution. *City and County of Denver v. Eggert*, 647 P.2d 216, 226-227 (Colo. 1982).

Therefore, the Court concludes that neither the Land Use Act nor the Solid Wastes Act constitute an unconstitutional delegation of matters of statewide concern to local entities. Hence, plaintiffs' fourth claim is without legal merit.

Plaintiffs' Fifth Claim

Plaintiffs' fifth claim contends that activities of Public Utilities are exempt from county regulation under the Land Use Act, specifically CRS 24-65.1-105. The relevant portions of 24-65.1-105 provide:

> (1) With regard to public utilities, nothing in this article shall be construed as enhancing or diminishing the rights or the power and authority of municipalities, counties, or the public utilities commission . . .
>
> (2) Nothing in this article shall be construed as enhancing or diminishing the rights and procedures with respect to the power of a public utility to acquire property and rights-of-way by eminent domain to serve public need in the most economical and expedient manner.

Extraterritorial water services of a municipality are exempt from regulation of the rates, fees, tolls or charges for such services. *Board of County Commissioners v. Denver Board of Water Commissioners,* 718 P.2d 235, 245 (Colo. 1986) ("Tri Counties"). However, the court in *Grand County* expressly stated that *Tri Counties* did not hold that a municipality's construction and operation of water projects enjoyed a general immunity from regulation. *Grand County* at 764. Rather, the *Grand County* court held that municipalities were subject to the regulation contemplated in the Land Use Act. *Id.* Therefore, the court concludes that plaintiffs' fifth claim must fail as a matter of law.

Plaintiffs' Seventh Claim

Plaintiffs' seventh claim contends that CRS 30-28-110(1)(c) supersedes Eagle County's authority under the Land Use Act. CRS 30-28-110 provides, in part,:

> (1)(a) Whenever any county planning commission has adopted a master plan of the county or any part thereof, no road, park or any public way, ground or space, . . . shall be constructed or authorized in the unincorporated territory of the county until or unless the proposed location and extent thereof has been submitted to and approved by such county or regional planning commission.
>
> * * *
>
> (c) If the public way, ground, space, building, structure or utility is one the authorization or financing of which does not, under the law governing the same, fall within the province of the board of county commissioners or the county officials or board, the submission to the commission shall be by the body or official having such jurisdiction, and the commission's disapproval may be overruled by said body by a vote of not less than a majority of its entire membership or by said official. . . .

Section 30-28-110 and the Land Use Act are not facially inconsistent. *Grand County* at 766. Any arguable power granted to a home-rule city in subsection 30-28-110(1)(c) to overrule planning commission disapproval of a project does not give the city unrestricted authority to ignore regulations adopted pursuant to the Land Use Act. *Grand County* at 766. Therefore, the Court concludes that 30-28-110 does not supersede the Land

Use Act. Consequently, plaintiffs' seventh claim is without legal merit.

Federal Preemption

Many of the criteria upon which the Board based its denials of permits for the Homestake II Project are not areas the County Commissioners have authority to regulate. The Proposed project is located entirely on federal Forest Service land. Generally, comprehensive federal laws preclude a county or state from prohibiting a specific land use on federal land. *Brubaker v. Board of County Commissioners, El Paso County,* 652 P.2d 1050 (Colo. 1982). However, a state or county may regulate local environmental conditions on federal lands. *Granite Rock Company v. California Coastal Commission,* 480 U.S. 677 (1987).

The Court concludes that federal law preempts any authority under which the county could arguably regulate land use on federal forest service land. Generally, where congressional legislation either explicitly or implicitly reflects an intent to occupy an entire field, state legislation dealing with the same area is precluded. *Brubaker* at 1055. The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it. *Id.*, citing *Rice v. Santa Fe Elevator Co.*, 331 U.S. 218, 230 (1947).

Section 1712(f) of the Federal Land Policy and Management Act ("FLPMA") provides:

> (f) The Secretary [of Interior] shall allow an opportunity for public involvement and by regulation shall establish procedures, including

> public hearings where appropriate, to give Federal, State, and local governments and the public, adequate notice and opportunity to comment upon and participate in the formulation of plans and programs relating to the management of public lands.

43 U.S.C. Sec. 1712.

Section 1604(d) of the National Forest Management Act ("NFMA") provides:

> The Secretary [of Agriculture] shall provide for public participation in the development, review, and revision of land management plans including, but not limited to, making the plans or revisions available to the public at convenient locations in the vicinity of the affected unit for a period of at least three months before final adoption, during which period the Secretary shall publicize and hold public meetings or comparable processes at locations that foster public participation in the review of such plans or revisions.

16 U.S.C. Sec. 1604.

The Court concludes that requiring the federal managing agencies to allow a party to participate in formulating plans for the management of federal public lands implies that the same party may not separately regulate the same activities on the same public lands. Therefore, the combined scheme of federal regulation provided for in FLPMA and NFMA occupies the field of land use planning on National Forest lands. Here, the County participated in public hearings on the Project which were held pursuant to FLPMA and NFMA. Therefore, County

regulation of the land use aspects of the Project is preempted by federal law.

The Court has previously found that the Cities stipulated that they did not wish the Board to consider alternatives to the submitted Application. Therefore, the Board did not determine that a permit for the Project would be denied under any circumstances. Consequently, the question of whether the Board has authority to deny the Permits categorically is not before the Court. However, the preemption doctrine has been held to preclude zoning officials from denying a special use permit for drilling on federal land, notwithstanding the proposed activities were inconsistent with the county's long range land use planning. *Brubaker,* 652 P.2d at 1053.

Here, the Board based its permit denials, in part, on land use planning criteria. As a result, the Court concludes that any of the findings of fact relied upon by the Board in denying the permits which relate to land use were improper (Findings I5, I(10), I(19), I(14), II(15), III(A)(1), III(A)(2), III(B)(1), III(B)(2), IV(1) and IV(2)).

State Preemption

In addition, state law preempts county regulation in some areas of environmental concern. Water quality and water rights are two areas in which the state has statutorily determined it is the final authority. Water quality is exclusively regulated by the Water Quality Control Commission through the Water Quality Control Division. CRS Sec. 25-8-102(4) ("This article and the agencies authorized under this article shall be the final authority on the administration of water pollution prevention,

abatement and control."). Plaintiff Cities have obtained the necessary permits and approvals by the Water Quality Control Commission. Therefore, the Board may not deny plaintiffs' permits based on concerns about water quality (Findings I(4), I(5), I(8), I(9), I(11), II(6) and II(7)).

Regulation of water rights is within the exclusive jurisdiction of the State Engineer. CRS Sec. 37-92-301(1); *State ex rel Danielson v. Vickroy,* 627 P.2d 752 (1981). Minimum in-stream flows and diversion conditions have been set by the State Engineer for the Homestake II Project. Therefore, the Court concludes that findings of fact relied on by the Board in denying plaintiffs' permits which concerned water quantity, including impacts on rafting businesses, were improper (Findings I(4), I(5), I(6), I(7), II(4) and II(5)).

Permit for a Major Extension of an Existing Water Collection System

In reviewing the Board's findings of fact, the only criteria on which the Board could properly rely in denying Cities' Permit for a Major Extension of an Existing Water Collection System (Part I of the Board Resolution) were those relating to wetlands, aquatic habitat, and possibly the nuisance factors which may effect the environment of Eagle County. Since this results in only six of the twenty findings of fact being relevant to permit denial, it is not possible to determine with any certainty what the result of the Board's decision would have been in absence of consideration of the majority of the findings.

Permit for Efficient Utilization of a State Water Project

The second permit denied by the Board was for Efficient Utilization of a State Water Project (Part II of the Board's Resolution). Again, the Board is precluded from basing its denial on land use considerations when the project is to be located entirely on federal lands. Therefore, the Court concludes that the findings based on environmental damage to wetlands and aquatic habitats are the only findings on which the Board could properly base its permitting decision. In absence of the findings relied on by the Board in denying the Cities' second permit which were not areas allowed to be regulated by the County, it is not possible to determine what the outcome of the permit decision would be.

Special Use Permit

Section III of the Board's Resolution was a denial of a Special Use Permit. As stated above, the County does not have the authority to deny a land use on federal land which has been approved by the federal agencies with responsibility for regulating the federal land in question. Of the findings relief on by the Board in denying plaintiffs Special Use Permit, all but two are related to land use planning. Finding III(A)(3) states that "The Project may adversely effect fish, wildlife or migratory ranges." Finding III(A)(4) states that "Evidence presented at the hearing failed to demonstrate that the adverse effect on fish, wildlife or migratory ranges can be adequately mitigated." The Board may regulate activities which cause environmental impacts, but not completely prohibit a

federally approved land use. Therefore, the Court concludes that it cannot determine what the Board's decision would be in absence of reliance on the irrelevant findings of fact.

Certificate of Designation

CRS Sec. 30-20-104 lists the factors to be considered in reviewing an application for a certificate to operate a solids wastes disposal site. CRS 30-20-104 provides, in part,:

> (1) In considering an application for a certificate of designation, the board of county commissioners shall take into account:
>
> (a) The effect that the solid wastes disposal site and facility will have on the surrounding property, taking into consideration the types of processing to be used, surrounding property uses and values, and wind and climatic conditions;
>
> (b) The convenience and accessibility of the solid wastes disposal site and facility to potential users;
>
> (c) The ability of the applicant to comply with the health standards and operating procedures provided for in this part 1 and such rules and regulations as may be prescribed by the department;
>
> (d) Recommendations by local health departments.

Apparently, the Board denied the permit due to consideration of subsection (1)(a), concerning the effect the site would have on surrounding property. The Board had

earlier found that the "neighborhood" to be considered included the land surrounding the federal forest land. The Court concludes that federal agencies administering such lands are the proper authority to determine land uses within the national forest.

Two of the findings of the Board would arguably justify denial of the Certificate of Designation. Unfortunately, these findings, that the Project did not conform with the Eagle County Master Plan and was not compatible with surrounding property, are not areas in which the County has any authority to regulate. Therefore, the Court concludes these findings are irrelevant.

Consequently, the Court concludes that the Board, in finding all other considerations mitigated in favor of approval of the Certificate of Designation, and having no authority to dictate land use planning on federal lands, effectively approved the Certificate of Designation.

The Court notes that due process violations and abuse of discretion claims have been made concerning the permitting process. The Court concludes that no due process violations occurred. However, the Court does not reach the abuse of discretion claim, finding that the Board's decision was insufficient as a matter of law.

The Court defers ruling on the claim that the permit fee was illegal until the Board has reconsidered its permit decisions.

THEREFORE, THE COURT ORDERS:

Plaintiff's First, Second, Third, Fourth, Fifth and Seventh Claims are dismissed.

The applications for a Permit for A Major Extension of a Water Project, Permit for Efficient Utilization of Municipal Water Project and the Special Use Permit are hereby remanded to the Eagle County Board of Commissioners for reconsideration in conformance with this Order. The Court defers ruling on the propriety of the Permit fees charged until after the Board's reconsideration, at which time an evidentiary hearing will be held, on that issue only.

DONE THIS 2nd DAY OF JULY, 1991.

BY THE COURT:

/s/ Wm. Jones
DISTRICT JUDGE

APPENDIX J

DISTRICT COURT, EAGLE COUNTY, COLORADO

Case No. 88 CV 142

ORDER SETTING ASIDE DECISION OF COUNTY COMMISSIONERS

CITY OF COLORADO SPRINGS AND CITY OF AURORA, Colorado municipal corporations,

Plaintiffs,

vs.

1. THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF EAGLE, STATE OF COLORADO;
2. GEORGE A. GATES, DONALD H. WELCH, RICHARD L. GUSTAFSON, in their official capacities as individual members of said Board;
3. THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF EAGLE, STATE OF COLORADO, in its capacity as the permitting authority under Sec. 24-65.1-101, et seq., C.R.S.
4. THE EAGLE COUNTY PLANNING COMMISSION;
5. CHARLES RIDGWAY, DAVID SLEMON, DENNIS GELVIN, DONALD PRICE, in their official capacities as individual members of said Commission;
6. THE COUNTY OF EAGLE, STATE OF COLORADO;
7. AVON METROPOLITAN DISTRICT;
8. TOWN OF AVON, COLORADO;
10. COLORADO RIVER OUTFITTERS ASSOCIATION;
12. EAGLE COUNTY SHERIFF, in his official capacity;
13. HOLY CROSS WILDERNESS DEFENSE FUND;
15. RED CLIFF WATER AND SANITATION DISTRICT;
16. TOWN OF EAGLE, COLORADO;
17. TOWN OF GYPSUM, COLORADO;

18. TOWN OF MINTURN, COLORADO;
19. TOWN OF REDCLIFF, COLORADO;
23. VAIL VALLEY CONSOLIDATED WATER DISTRICT;
25. EAGLE COUNTY HISTORICAL SOCIETY,

Defendants.

THIS MATTER comes before the Court on appeal from a decision by defendant Board of County Commissioners of Eagle County ("Board"). The Court has re-read the cross motions for Summary Judgment, Responses and Replies and Responses and Replies to the Decision on Remand. The Court has reviewed Board Resolution 91-104, the transcript of the hearings, and exhibits. Being fully advised, the Court makes the following Findings of Fact:

The Cities of Colorado Springs and Aurora ("Cities") are owners of decreed water rights in Eagle County. A portion of such water rights were developed through Phase I of the Homestake Project, completed in 1966. Phase I of the Homestake project was designed to accommodate additional flows to be developed at a later date. The Cities now seek to develop Phase II of the project.

The diversion sites for Phase II are located entirely on United States Forest Service lands. These lands were designated by Congress in 1980 as the Holy Cross Wilderness. At the time of the designation as wilderness, the Cities received a comprehensive statutory exemption allowing for the development of their water rights. The area in dispute is zoned R, for resource development by the county.

The Cities have received approval for the project from the federal agencies which have jurisdiction over its various aspects, specifically a 404 permit from the Army Corps of Engineers, and a permit from the U.S. Forest Service. On May 20, 1986, the Cities applied to Eagle County for permits for Major Extension of an Existing Water Project, Efficient Utilization of an Existing Water System, Approval pursuant to C.R.S. 30-28-110, and a Certificate of Designation pursuant to C.R.S. 30-20-101.

The Eagle County Planning Commission recommended approval of the Application subject to compliance with certain conditions. One of the 52 conditions imposed by the Planning Commission requires that any reductions in sales taxes directly attributable to a decrease in recreational visitor days caused by the project be assessed to the Cities and placed in an escrow account. There is no specific taxing authority over water projects granted to counties, and Eagle County has not passed a resolution applicable to this situation.

Public hearings were held, and on February 22, 1988, the Eagle County Board of County Commissioners unanimously denied the Cities' application for permits. This action was commenced on March 18, 1988. The following defendants have filed a Disclaimer in this action: Town of Minturn, Colorado; and Eagle County Historical Society. The following defendants have indicated, by letters to the Court, that they do not wish to participate in this action: Red Cliff Water and Sanitation District; and the Town of Red Cliff, Colorado. The following original defendants have filed no answer to the complaint: Colorado River Outfitters Association; Eagle County Sheriff, in his official capacity; and the Town of Gypsum, Colorado.

At the time this matter was first briefed, there were eleven remaining claims. By Order dated July 22, 1988, the Court dismissed plaintiff's Sixth and Thirteenth claims. In an order dated July 2, 1991, the Court ordered plaintiff's First, Second, Third, Fourth, Fifth and Seventh Claims dismissed. In the July 2 Order, the Court also determined that the Board had effectively granted the Cities' application for a Certificate of Designation.

In the July 2 Order, the Court determined that the Board had based its permit denial substantially on factors over which the county had no jurisdiction. The matter was remanded to the Board so it could consider whether the remaining valid factors were sufficient to support denial of the Cities' application for the remaining three permits. On remand, the Board affirmed the denial of the permits based on the following facts:

I. APPLICATION FOR A PERMIT TO CONDUCT A DESIGNATED ACTIVITY OF STATE INTEREST: A MAJOR EXTENSION OF AN EXISTING WATER COLLECTION SYSTEM:

1. The evidence shows that the proposed development will significantly deteriorate marshlands or wetlands.

2. The Applicant has failed to show that the proposed development will not significantly deteriorate aquatic habitats.

3. Evidence presented at the hearing failed to demonstrate that the significant deterioration of the wetlands can be adequately mitigated.

13. There may be a negative effect on the aquatic environment because of increases in water temperature which cause fish to be subject to disease.

14. Evidence presented at the hearing failed to demonstrate that the negative effect on the aquatic environment can be adequately mitigated.

15. The proposed development will cause nuisance factors such as increased traffic, dust, fire hazards, and dangers from hazardous chemical contamination, explosives and fuels. The mitigating measures proposed by the Cities fail to adequately satisfy this criterion.

II. APPLICATION FOR A PERMIT TO CONDUCT THE FOLLOWING DESIGNATED ACTIVITY OF STATE INTEREST: EFFICIENT UTILIZATION OF A MUNICIPAL WATER PROJECT:

1. The evidence shows that the proposed development will significantly deteriorate marshlands or wetlands.

2. The Applicant has failed to show that the proposed development will not significantly deteriorate aquatic habitats.

3. Evidence presented at the hearing failed to demonstrate that the significant deterioration of wetlands can be adequately mitigated.

8. There may be a negative effect on the aquatic environment because of increases in

water temperature which cause fish to be subject to disease.

9. Evidence presented at the hearing failed to demonstrate that the negative effect on the aquatic environment can be adequately mitigated.

III. SPECIAL USE PERMIT:

3. The project may adversely affect fish, wildlife or migratory ranges.

4. Evidence presented at the hearing failed to demonstrate that the adverse effect on fish, wildlife or migratory ranges can be adequately mitigated.

Both the Eagle County Planning Commission and the Board found that a wetland species shift would constitute a significant deterioration of wetlands. The Board failed to indicate what additional mitigation measures, over and above those tendered by the Cities, were necessary to mitigate alleged nuisance factors, or why the Cities tendered mitigation was inadequate.

A federal permit granted to the City by the Army Corps of Engineers states that the Cities have to devise a plan to "prevent loss of wetlands." The Corps permit also states that any mitigation utilized in conjunction with the Cities' wetland plan "shall not cause more than minimal visual intrusion to the wilderness area, and shall not have significant environmental impacts."

The only evidence in the record on aquatic habitats is found in the Base Line Report submitted by the Cities. There was no evidence presented on aquatic habitats by

any other parties refuting the Cities' Base Line Report. Furthermore, there was no testimony on the record that the project "may adversely affect fish, wildlife or migratory ranges."

ARGUMENTS

Cities argue that the Board's actions in denial of the three applications violated their due process rights, as evidenced by the Board's refusal to take official notice of the mitigation plans approved by the EPA and U.S. Forest Service. Furthermore, the Cities argue that the Board's decision was arbitrary and capricious and an abuse of discretion.

On remand, the Cities made a motion to the Board to submit federal agency documents. The motion requested that the Board take administrative notice of final federal decisions which were rendered after the close of the Board's administrative record and after the Board's initial decision. The Cities argue that they did not wish to reopen the record to add evidence, but believed that the Board would want to consider, in its analysis, the content of the final federal approvals as they regard monitoring and mitigation of potential environmental impacts.

The federal documents submitted with the motion identify the federally imposed conditions which must be met by the Cities in the construction and operation of the project. The defendants, including Eagle County and Holy Cross Wilderness Defense Fund ("HCWDF"), participated in the federal process which resulted in the final federal permitting. In addition, a federal suit challenging,

among other things, the federal procedure in promulgating the federal documents, was dismissed.

The Board denied the motion to take administrative notice of the documents. The Cities contend that the federal documents they sought to admit to the record were for the purpose of establishing the conditions imposed by the federal agencies relative to monitoring and mitigation requirements, not for the purpose of establishing the propriety of the conditions, or the data upon which they are based.

Conversely, HCWDF contends that the doctrine of taking official notice is inapplicable. HCWDF distinguishes the cases cited by the Cities by stating that these cases related to taking notice during the original proceeding, not taking notice on remand. Further, HCWDF disputes that efficacy and scientific basis of the "proposals" for mitigation and states that if the record were to be reopened, it could put on relevant rebuttal evidence. As noted above, HCWDF had the opportunity to rebut the evidence at the federal level. Finally, HCWDF contends that reopening the record on remand would have violated HCWDF's and other parties' due process rights.

The Cities also seek a determination that the County did not comply with the Court's order on remand by failing to examine and rebalance the facts in the record over which they had jurisdiction, but rather limited the parties to legal argument regarding whether the criteria for approval were satisfactorily met.

The Cities additionally argue that the Board does not have the power to deny a project built by a home-rule

municipality, which is to be built on federal lands and has received federal approval.

Finally, the Cities have alleged bias on the part of two commissioners. Specifically, the Cities' pertinent allegations are: 1) Commissioner Gustafson was present on behalf of the Western Alliance to Encourage Responsibility ("W.A.T.E.R.") at a federal environmental assessment meeting urging adoption of a position against the project; 2) Commissioners Gustafson and Welch are signatories to a petition circulated prior to October 1984 demanding that federal, state and local officials protect the Holy Cross Wilderness by denying permits for the project at issue; 3) Gustafson testified before a Congressional subcommittee meeting against the Homestake II project; 4) Newspaper articles on the campaigns of Welch and Gustafson show that both ran on platforms of opposition to the Homestake II project; 5) The denial by the Board was despite the recommendation for approval by both the Director of the County Community Development Department and the Eagle County Planning Commission.

The County asserts that in the wake of the Court's preemption rulings there remained sufficient grounds to affirm the Board's previous decision. The Board contends that its action in denying the Cities' applications in its original 1988 decision was not predicated on federal permitting actions, and any subsequent federal actions are of no effect on the county permitting process.

The Cities have responded by stating that the Board took administrative notice of an EPA letter from Gene Reetz to Dave Stark ("EPA letter"), which was not a final

agency decision at an earlier proceeding. The EPA letter was submitted and admitted after the close of the hearing, but prior to deliberation on the original decision. The Board had indicated during the original hearings, that it would take notice of final agency decisions. After the admission of the EPA letter on November 3, 1987, the Board did not permit the filing of responsive documents by the parties, nor did it allow cross examination of the author.

The Cities also claim that the Board lacked the power of denial. The Cities contend that, although the laws pertaining to federal permits require compliance with applicable state laws, any preempted state or local law is not an "applicable law." Furthermore, the holdings in *California Coastal Commission v. Granite Rock*, 480 U.S. 572, 107 S.Ct. 1419, 94 L.Ed.2d 577 (1988) and *Columbia Basin Land Protection Assn. v. Schlessinger*, 643 F.2d 585 (9th Cir. 1981) support their contention that a county may not deny a permit to operate a federally approved project on federal land.

THE COURT makes the following Conclusions of Law:

The Court adopts the findings and conclusions in the Court's previous orders, dismissing plaintiff's First, Second, Third, Fourth, Fifth, Sixth, Seventh and Thirteenth Claims.

When this Court remanded the decision, it asked that the Board determine whether it would still deny the permits if the 14 invalid findings, out of 20 total, were taken away. This implies a re-evaluation of the facts

supporting the remaining findings. This was not done by the Board.

DENIAL OF DUE PROCESS RIGHTS

After reviewing the transcripts of the proceedings before the Board in this matter, and the resolutions resulting from the hearings, the Court has no choice but to conclude that the Board denied the Cities due process. Specifically, the Board concluded that environmental impacts either would or "may" occur and the Cities failed to prove adequate mitigation. However, the Board refused to take official, or administrative, notice of the federally approved environmental mitigation plans. Although the Court is sympathetic to the Board's dilemma in "cutting off" what could be an endless flow of evidence, the fact is that the federally approved mitigation plans were the most relevant evidence on the very topic on which the permit denials were based.

To meet due process standards, all parties must be given, among other things, the opportunity to offer evidence in explanation or rebuttal. *Nesbit v. Industrial Commission*, 607 P.2d 1024, 43 Colo.App. 398 (1979), cert. den. Here, the Board made its decision based on failure of the Cities' mitigation plans, without considering federally required mitigation, and did not allow the Cities to offer what is arguably the most competent evidence of mitigation. The reason given for refusal to take notice of the federally approved plans was violation of the other parties' due process rights. However, the Board had earlier taken notice of a letter written by an EPA employee, not a final agency decision, to which the Cities were not given

a chance to rebut the conclusions contained therein or cross-examine the author. The Board cannot admit evidence, deny an opportunity for rebuttal and then close the door on any evidence from the Cities. Denial of the Cities' motion to take official notice of the federal documents was a violation of due process.

A decision maker is not disqualified on due process grounds simply for having taken a position, even in public, on policy issues related to a dispute, if there is no showing that the decision maker is incapable of judging particular controversy fairly on the basis of its own circumstances. *Mountain States Tel. and Tel. Co. v. Public Utilities Com'n of State of Colo.*, 763 P.2d 1020 (1988). Here, two of the commissioners took public positions against a general policy of transmountain diversions of water. In addition, there is evidence that these commissioners publicly indicated a predetermined outcome on this particular case. However, it is equally probable that the commissioners were stating their position on the federal permit decisions, which they later refused to recognize. Given the lack of direct evidence of bias, the Court declines to find the actions of the two commissioners to be a violation of the Cities' rights on the basis of bias.

ABUSE OF DISCRETION

Although administrative hearings need not comply with strict rules of evidence, evidence possessing probative value commonly accepted by reasonable and prudent persons in the conduct of their affairs should be admitted. *Fueston v. City of Colorado Springs*, 713 P.2d 1323 (Colo.App. 1985). The Court concludes that making the

decision to deny the permits, in absence of the most relevant evidence for the Applicant, was an abuse of discretion.

ARBITRARY AND CAPRICIOUS

In order for a court to set aside a decision by an administrative body on the ground that it is arbitrary and capricious, the court must find that the decision is unsupported by any competent evidence. *Board of County Commissioners of Jefferson County v. Simmons*, 494 P.2d 85, 177 Colo. 347 (Colo. 1972). Here, the Board's decision was based on deterioration of aquatic habitats, deterioration of wetlands, changes to the aquatic environment, and possible effect on fish, wildlife or migratory ranges, and the Cities failure to demonstrate adequate mitigation. However, the only evidence in the record concerning aquatic habitats is found in evidence supplied by the Cities. Furthermore, there is no evidence in the record concerning the effect on fish., wildlife or migratory ranges. Finally, evidence of federally required mitigation of the deterioration of wetlands was not allowed in the record.

The final fact found by the Board concerning nuisance factors relates only to the building of the project, and not to its operation. Although the County argues that it views the Homestake II project differently than other development within the county because it will be completed in a wilderness area, this argument is refuted by the fact that when the Holy Cross Wilderness was created, and exemption allowing the development of the Cities' previously decreed water rights was part of the

wilderness designation. Therefore, the area is not designated as wilderness by the federal government for purposes of the Homestake II project. Furthermore, the county zoning designation of the area in question is not a wilderness designation. Consequently, the argument by the County that the nuisance factors have a greater impact due to the wilderness status of the land surrounding the project is without merit.

In light of the fact that the Board approves other projects in the county which create the same nuisance factors, it is hard to say permit denial based legally only on this factor is supported by competent evidence. Courts are not to stand idly by and permit the arbitrary and unjustified exercise of discretion. *Colorado State Bd. of Nurse Examiners v. Hehu*, 268 P.2d 401, 129 Colo. 125 (Colo. 1954). The Court concludes that the decision of the Board is not supported by competent evidence and is therefore arbitrary and capricious.

OTHER ISSUES

The Cities contend that one of the conditions imposed by the Planning Commission, that they compensate the county for lost tax revenues, constitutes an illegal tax. First, there is no evidence that there will be lost revenues. Second, there is no procedure by which such "lost" revenues can be determined and, therefore, the basis of this tax is speculative. Furthermore, it is an illegal tax, as the county has no authority to tax this water project.

Finally, the Cities contend the permit application fee charged is excessive. On the face of it, there appears to be

merit to this assertion. The Court will address that issue in a separate hearing.

THEREFORE, THE COURT ORDERS:

The Cities' due process rights were violated in the course of the denial of their permit applications. The action of the Board was arbitrary and capricious and an abuse of discretion. Consequently, the decision denying the Cities' permit applications is vacated and remanded to the Board with directions to approve the three permits in question, subject to the federally imposed conditions.

The Cities will set a hearing to determine the propriety of the fees charged for the application.

DONE THIS 14 DAY OF July, 1992.

BY THE COURT:

/s/ Wm. Jones
DISTRICT JUDGE

APPENDIX K

DISTRICT COURT, EAGLE COUNTY, COLORADO

Case No. 88 CV 142

ORDER ON RECONSIDERATION

CITY OF COLORADO SPRINGS AND CITY OF AURORA,
Colorado municipal corporations,

Plaintiffs,

vs.

1. THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF EAGLE, STATE OF COLORADO;
2. GEORGE A. GATES, DONALD H. WELCH, RICHARD L. GUSTAFSON, in their official capacities as individual members of said Board;
3. THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF EAGLE, STATE OF COLORADO, in its capacity as the permitting authority under Sec.24-65.1-101, et seq., C.R.S.
4. THE EAGLE COUNTY PLANNING COMMISSION;
5. CHARLES RIDGWAY, DAVID SLEMON, DENNIS GELVIN, DONALD PRICE, in their official capacities as individual members of said Commission;
6. THE COUNTY OF EAGLE, STATE OF COLORADO;
7. AVON METROPOLITAN DISTRICT;
8. TOWN OF AVON, COLORADO;
10. COLORADO RIVER OUTFITTERS ASSOCIATION;
12. EAGLE COUNTY SHERIFF, in his official capacity;
13. HOLY CROSS WILDERNESS DEFENSE FUND;
15. RED CLIFF WATER AND SANITATION DISTRICT;
16. TOWN OF EAGLE, COLORADO;
17. TOWN OF GYPSUM, COLORADO;
18. TOWN OF MINTURN, COLORADO;

19. TOWN OF REDCLIFF, COLORADO;
23. VAIL VALLEY CONSOLIDATED WATER DISTRICT;
25. EAGLE COUNTY HISTORICAL SOCIETY,

Defendants.

THIS MATTER comes before the Court on the Board of County Commissioners of the County of Eagle's (the "County" or the "Board") motion for reconsideration, or in the alternative for entry of partial final judgment pursuant to Rule 54(b). Defendants Holy Cross Wilderness Defense Fund ("HCWDF") and Vail Valley Consolidated Water District have also filed motions for reconsideration. Collectively, the Court will refer to HCWDF, the County, the Board and Vail Valley Consolidated Water District as "Defendants." The Court has read the Motion, Responses and Replies, and being fully advised, makes the following findings of fact:

The Defendants request that the Court reconsider its order of July 14, 1992 ("Order"). In the Order, the Court determined that the City of Colorado Springs and the City of Aurora's ("Cities") due process rights were violated in the course of the Board's denial of their permit applications. In addition, the Court determined the action of the Board was arbitrary and capricious and an abuse of discretion. This Court further ordered the Board to issue the three permits in question, subject to the conditions imposed by the federal permitting agencies.

The Board argues that the Court's Order deprived the parties, other than the Cities, their due process rights by denying the other parties an opportunity to rebut the findings in the Cities' revised wetlands mitigation plan.

The Board argues that reopening the record was required in order for it to consider the revised wetlands mitigation plan; that it was not a legitimate alternative to take official notice of the plan, without a chance for the other parties to respond.

The Board argues that even if it erred in deciding not to evaluate the Cities' revised mitigation plan, the remedy ordered by this Court, of directing the Board to issue the permits, is inappropriate. The Board contends that judicial review of an inferior tribunal's discretionary decision-making is limited to an analysis of whether that tribunal exceeded its jurisdiction or abused its discretion, and the court cannot fashion a remedy to cure a procedural defect. The Board contends that the proper remedy here would be a remand for further proceedings.

Conversely, the Cities argue that the Court was correct in its rulings contained in the Order. Specifically, the Cities contend that they were not asking the Board to reopen the hearing record to take further evidence of mitigation, but they wished the Board to take notice of requirements imposed on the Cities by federal agencies for mitigating wetlands injury. Furthermore, the Cities contend that the Court was within its discretion in ordering the County to issue the disputed permits.

THE COURT makes the following Conclusions of Law:

Although the Board attempts to rationalize its refusal to consider the mitigation requirements mandated by federal agencies as a move to protect due process rights, this Court is not convinced. The Court did not expect the

Board to reopen the hearing record concerning the specifics of the mitigation plan, but rather assumed the Board would balance its finding of inadequate mitigation against the newly required mitigation measures. The Court is of the opinion that the Board may take official notice of federal requirements without reopening the record as to the propriety of the specifics of the mitigation plan, especially since the other defendants who object to such a procedure were participants in the federal agency process that led to the plan. The only issue up for argument would be the requirements themselves, which should be easy to discern from federal documents. Therefore, the Court will not modify its findings of arbitrary and capricious or abuse of discretion.

A court may direct a government body to take a specific action, such as issuing a license, when the Court determines it would be futile to remand for re-determination. See *Buddy and Lloyd's Store No. 1, Inc. v. City Council,* 337 P.2d 389 (Colo. 1959). The wide discretion which is vested in a permitting authority in granting or denying permits is not to be construed as authority to establish a local public policy, either by express resolution or by secret agreement, contrary to state and federal law. Id. at 391-392.

However, in this case the Court concludes it is a better procedure to remand the decision to the Board for proceedings in conformance with this Court's orders. Relief under C.R.C.P. 106(a)(4) is limited to a determination of whether the Board exceeded its jurisdiction or abused its discretion. *Beaver Meadows v. Board of County Commissioners,* 709 P.2d 928 (Colo. 1985).

THEREFORE, THE COURT ORDERS:

On reconsideration, the Court vacates that portion of its previous Order requiring the Board to issue the Cities the permits. The permitting decision is remanded to the Board with directions to take official notice of the mitigation requirements imposed on the Cities by federal agencies. This Court's previous Order stands in all other respects and is a final judgment as defined in Rule 54(b), C.R.C.P.

DONE THIS 27 DAY OF JANUARY, 1993.

BY THE COURT:

/s/ Wm L Jones
DISTRICT JUDGE

CERTIFICATE OF MAILING

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The foregoing order was placed in the U.S. Mail, postage prepaid and affixed, addressed to the above parties on January 27, 1993.

/s/ Carol S. Martin

APPENDIX L

THE COURT OF APPEALS OF THE
STATE OF COLORADO

Case Number 93CA0386

ORDER

CITY OF COLORADO SPRINGS ET AL V EAGLE COUNTY ET AL

Upon consideration of the Petition for Rehearing filed by the Appellant Cross Appellee herein, the Petition is hereby DENIED. It is ordered that issuance of the Mandate is stayed to and including January 17, 1995 provided that if a Petition for Writ of Certiorari is timely filed with the Supreme Court of the State of Colorado, the stay shall remain in effect until disposition of the cause by the Supreme Court.

BY THE COURT:

Davidson, J.

Jones, J.

Rothenberg, J.

DATED: December 15, 1994

APPENDIX M

SUPREME COURT, STATE OF COLORADO
CASE NO. 94SC765
CERTIORARI TO THE COLORADO COURT OF APPEALS, 93CA0386 & 93CA0412
DISTRICT COURT, EAGLE COUNTY, 88CV142

ORDER OF COURT
(Filed June 6, 1995)

CITY OF COLORADO SPRINGS AND CITY OF AURORA, COLORADO, municipal corporations,

Petitioners,

v.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF EAGLE, STATE OF COLORADO; GEORGE A. GATES, JOHNETTE PHILLIPS, JAMES E. JOHNSON, JR., in their offical [sic] capacities as individual members of said Board; THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF EAGLE, in its capacity as the permitting authority under § 24-65-101 *et seq.*, C.R.S.; THE EAGLE COUNTY PLANNING COMMISSION; MARK DONALDSON, ROBERT TETHER, ARLENE QUENON, ROBERT MORRIS, DONALD PRICE, in their offical [sic] capacities as individual members of said commission; THE COUNTY OF EAGLE, STATE OF COLORADO; HOLY CROSS WILDERNESS DEFENSE FUND; and VAIL VALLEY CONSOLIDATED WATER DISTRICT,

Respondents.

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals, and after review

of the record, the briefs, and the judgment of said Court of Appeals,

IT IS THIS DAY ORDERED that said Petition for Writ of Certiorari shall be, and same hereby is, DENIED.

BY THE COURT, EN BANC, JUNE 5, 1995.

CHIEF JUSTICE ROVIRA and JUSTICE MULLARKEY would grant as to the following issues:

Whether the court of appeals erred in allowing a county, under the Colorado Land Use Act, § 24-65.1-101 *et seq.*, 10B C.R.S. (1988 & 1994 Supp.) (H.B. 1041), to veto a municipal water project located on federal lands.

Whether the court of appeals erred in finding that the county did not act arbitrarily and capriciously in denying the municipalities their requested land use permits.

(Seal)

Whether the court of appeals erred in ruling that Colorado home rule municipalities do not have standing to pursue a claim for the regulatory taking of property without just compensation.

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Honorable William L. Jones
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Eagle County District Court
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Patrick H. Stanford, Clerk
Colorado Court of Appeals

APPENDIX N

DISTRICT COURT, COUNTY OF EAGLE, STATE OF COLORADO

Civil Action No. 88CV142

MEMORANDUM BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

CITY OF COLORADO SPRINGS AND
CITY OF AURORA,
Colorado municipal corporations,

Plaintiffs,

vs.

1. THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF EAGLE, STATE OF COLORADO;
2. GEORGE A. GATES, DONALD H. WELCH, RICHARD L. GUSTAFSON, in their official capacities as individual members of said Board;
3. THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF EAGLE, STATE OF COLORADO, in its capacity as the permitting authority under § 24-65.1-101, *et seq.*, C.R.S.;
4. THE EAGLE COUNTY PLANNING COMMISSION;
5. CHARLES RIDGWAY, DAVID SLEMON, DENNIS GELVIN, DONALD PRICE, in their official capacities as individual members of said Commission;
6. THE COUNTY OF EAGLE, STATE OF COLORADO;
7. AVON METROPOLITAN DISTRICT;
8. TOWN OF AVON, COLORADO;
9. COLORADO COUNCIL OF TROUT UNLIMITED;

10. COLORADO RIVER OUTFITTERS ASSOCIATION;
11. DIVISION OF WILDLIFE, STATE OF COLORADO;
12. EAGLE COUNTY SHERIFF, in his official capacity;
13. HOLY CROSS WILDERNESS DEFENSE FUND;
14. JAMES FRANKLIN LAMONT;
15. RED CLIFF WATER AND SANITATION DISTRICT;
16. TOWN OF EAGLE, COLORADO;
17. TOWN OF GYPSUM, COLORADO;
18. TOWN OF MINTURN, COLORADO;
19. TOWN OF REDCLIFF, COLORADO;
20. TOWN OF VAIL, COLORADO;
21. UPPER EAGLE REGIONAL WATER AUTHORITY;
22. UPPER EAGLE VALLEY SANITATION DISTRICT;
23. VAIL VALLEY CONSOLIDATED WATER DISTRICT;
24. VAIL ASSOCIATES, INC.; and
25. EAGLE COUNTY HISTORICAL SOCIETY,

Defendants.

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* * *

C. THE BOARD HAS ATTEMPTED TO REGULATE AREAS PRE-EMPTED BY FEDERAL LAW.

Eagle County cannot apply its 1041 regulations to this permitting process because it is pre-empted from so doing by virtue of federal law. As previously indicated, the Cities' project is to be located entirely upon federal

Forest Service lands. The Forest Service Management Plan (Record, Vol. I, Exh. A-11) specifically states that the White River National Forest is for *multiple use*. This is consistent with the language of the Federal Land Policy Management Act (FLPMA) 43 U.S.C.A. § 1701, § 1732 and the language of the National Forest Management Act, 16 U.S.C.A. § 1600, *et seq.*, (West 1985) both of which encourage multiple use, including water resource development.

Pursuant to federal requirements under the National Environmental Policy Act (NEPA), 42 U.S.C.A. § 4321, *et seq.*, (West 1977) the Forest Service performed an environmental analysis which lead to a number of public hearings, the submission of numerous written comments, and the eventual issuance of a Final Environmental Impact Statement (FEIS). (Record, Vol. I, Exh. A-l.) Eagle County took a very active roll [sic] in this environmental review process (Appendix J, pp. 14-17, Record, Vol. I, Exh. A-l), and had numerous opportunities to place its concerns of record and have them addressed by the federal agencies. The Cities also obtained a FLPMA permit (Appendix C), which permit provided the Cities with the necessary Forest Service easement. As previously stated, this permit contained numerous mitigation measures designed to ensure that the project was constructed and operated in an environmentally sound fashion. In addition, the Cities received a Section 404 Permit from the U.S. Corps of Engineers (Appendix D), which permit also embodied numerous conditions addressing various environmental issues including aesthetics, water quality, and wetlands preservation. As to the latter concern, the Corps' permit specifically stated that the Cities had to devise a plan to "prevent the loss of wetlands". (Appendix D, p. 5.) Any

mitigation utilized in conjunction with such plan "shall not cause more than minimal visual intrusion to the wilderness area, and shall not have significant environmental impacts". (Appendix D, p. 3.) It should also be noted that the Corps found the alternative being permitted to be consistent with §§ 101, 401, and 404 of the Clean Water Act, NEPA, the Endangered Species Act, the Fish and Wildlife Coordination Act, policies concerning scenic and recreational values, and policies concerning energy conservation. (Appendix D, pp. 4-5.) Nevertheless, despite the above federal approvals, the numerous protective conditions contained in such approvals, Eagle County's participation in the federal process, and the location of the project on federal lands, the Board made a contrary finding as to the acceptability of the project and *denied* the requested local land use.

The federal pre-emption doctrine has been succinctly stated by the court in *California Coastal Commission v. Granite Rock Company*, 480 U.S. 572, 107 S.Ct. 1419, 94 L.Ed.2d 577, 592 (1987):

> State law can be pre-empted in either of two general ways. If Congress evidences an intent to occupy a given field, any state law falling within that field is pre-empted. [Citations deleted.] If Congress has not entirely displaced state regulation over the matter in question, state law is still pre-empted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, [citation deleted] or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress. [Citations deleted.]

This is the same analysis employed by the Colorado Supreme Court in *Brubaker v. Board of County Commissioners*, 652 P.2d 1050, 1055 (Colo.1982). Both of these decisions inexorably lead to the conclusion that the Board could not deny the permits being sought by the Cities.

In *Brubaker*, plaintiff sought from the Board of County Commissioners a special use permit for purposes of conducting certain mining operations which had received federal approval. The Board denied the permit application on the grounds that the activity was inconsistent with the long-range plans of the County and incompatible with uses on surrounding properties. However, the Colorado Supreme Court held that such a denial was pre-empted by federal law as it stood as an "obstacle to the accomplishment and execution of the full purposes and objectives of Congress". *Brubaker v. Board of County Commissioners*, 652 P.2d at 1055.

> This activity has been subjected to the necessary federal review and approvals, but the Board asserts that it may now deny the appellants their right to use the land in this manner. The Board seeks not merely to supplement the federal scheme, but to prohibit the very activities contemplated and authorized by federal law. Such a veto power is not consistent with the Supremacy Clause.

Brubaker v. Board of County Commissioners, 652 P.2d at 1056. Though acknowledging that it may be possible to impose "reasonable" environmental conditions upon such an activity, the Court chastised the County for attempting not to regulate, but to "prohibit" federally

authorized activities. *Brubaker v. Board of County Commissioners,* 652 P.2d at 1059.

In so holding, the *Brubaker* court cited with approval the decision of the Ninth Circuit in *Ventura County v. Gulf Oil Corp.*, 601 F.2d 1080 (9th Cir. 1979) aff'd mem. 445 U.S. 947 (1980), wherein Gulf sought to secure from the county an open space permit prior to undertaking its mineral exploration activities on federal lands within the county. In holding that the governing federal legislation preempted such county regulation, as there existed an impermissible conflict between the two bodies of law, the court stated:

> Despite this extensive federal scheme reflecting concern for the local environment as well as development of the nation's resources, Ventura demands a right of final approval. Ventura seeks to prohibit further activity by Gulf until it secures an Open Space Use Permit which may be issued on whatever conditions Ventura determines appropriate, or which may never be issued at all. The federal Government has authorized a specific use of federal lands, and Ventura cannot prohibit that use, either temporarily or permanently, in an attempt to substitute its judgment for that of Congress.

Ventura County v. Gulf Oil Corp., 601 F.2d at 1084. See also: *Federal Power Commission v. Oregon,* 349 U.S. 435 (1955). The Ventura court then continued:

> Finally, we are reassured in the correctness of our decision by policy considerations implicitly reflected in the structure and operation of the Mineral Lands Leasing Act of 1920 and the National Environmental Policy Act of 1969 (42

> U.S.C. §§ 4321, *et seq.*). As Ventura recognized in filing its second amended complaint, the National Environmental Protection Act (NEPA) and the guidelines, regulations, and executive orders issued in pursuance of that act, mandate extensive federal consideration and federal-local cooperation concerning the local, environmental impact of federal action under the Mineral Lands Leasing Act. If federal officials fail to comply with these requirements, Ventura has a remedy against those officials.

Ventura County v. Gulf Oil Corp., 601 F.2d at 1086. Similarly, in the present instance, the County seeks to prohibit the federally authorized activity, having denied the requested permits. It does so even though the NEPA process has been invoked and the County has participated therein.[16] Such conduct is contrary to the holdings in both *Brubaker*, 652 P.2d 1050 (Colo.1982) and *Ventura County*, 601 F.2d 1080 (9th Cir. 1979) aff'd mem. 445 U.S. 947 (1980).

The recent decision by the United States Supreme Court in *California Coastal Commission v. Granite Rock*, 480 U.S. 572, 107 S.Ct. 1419, 94 L.Ed.2d 577, is consistent with the above holdings. Although the sharply divided Court ruled that reasonable state environmental regulations covering forest service land were not per se pre-empted by federal law, the five to four majority described this

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[16] The Board did note an indication of "deficiencies in the Environmental Impact Statement," (Appendix F, p. 7, Finding No. 12) without tying their finding to any local criteria. If the Board was dissatisfied with the EIS process, it could have sought review thereof. Instead, it sat on its hands.

holding as a "narrow" rejection of a "purely facial challenge." *Granite Rock,* L.Ed.2d at 591, 599. In *Granite Rock,* the State had not participated in the Federal permit process. Moreover, Granite Rock had not even applied for a State permit, arguing that there was no possible set of conditions that the State could place on its permit that would not conflict with federal law. It therefore had " . . . lost the possibility of making this argument [prohibition] in this litigation". *Granite Rock,* L.Ed.2d at 596.

Significantly, the majority decision assumed without deciding, an assumption deemed "correct" in the dissent by Justices White and Scalia and consistent with the decision in *Ventura County,* that "the combination of the NFMA and the FLPMA pre-empt the extension of state land use plans . . . in national forest lands". *Granite Rock,* L.Ed.2d at 594. The Court went on to stress that the State was not asking Granite Rock to comply with a *local* land use plan or zoning ordinance, but rather with the regulations of a *State* Commission concerned with "compliance with the environmental criteria in the Coastal Act itself". *Granite Rock,* L.Ed.2d at 595 n.2. The Court accepted the State's assertion that it did not seek to prohibit the activity [mining], but only to regulate the environmental aspects of the activity. *Granite Rock,* L.Ed.2d at 595. The Court placed emphasis on the State's assertion that the federal legislation did not pre-empt state environmental regulation of federal land *"unless the regulation prohibits mining altogether"* (Court's emphasis) and cautioned that there could be "state environmental regulation so severe that a particular land use would become commercially impracticable". *Granite Rock,* L.Ed.2d at 595. However, since Granite Rock had not applied for the state permit, it

was unable to show the conditions which the State would have placed upon its permit. Given the "as yet unidentified conflicts with the federal scheme" and the "barren record," the Court cautiously accepted the possibility that the State might impose reasonable environmental regulations. *Granite Rock,* L.Ed.2d at 600.

The facts of the instant case are clearly different than those presented in *Granite Rock,* and are indeed on point with those in the *Brubaker,* 652 P.2d 1050 (Colo.1982) decision. In the present case, the County actively participated in the federal process. To the extent the County is now seeking to raise environmental concerns they were specifically addressed in that process.[17] Further, unlike

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[17] Even environmental concerns, assuming they can be addressed by the local entity, cannot be of a general or generic character or they will run a-foul of the pre-emption doctrine.

> Without deciding to what extent the City might impose additional environmental restrictions on the facility in exercising its traditional land use authority, I find the denial of the permit based on generalized environmental or health and safety concerns, where the EPA has already found the health, safety, and environmental risk to be acceptable, is impermissible under the doctrine of federal pre-emption. Allowing local governments to impose a permit requirement and then to deny the permit on unspecified environmental grounds, without articulating specific health or safety concerns or setting forth particular environmental requirements which the facility must meet, surely frustrates congressional intent behind the whole research, development, and demonstration program.

Ogden Environmental Services v. City of San Diego, 687 F.Supp. 1436, 1448 (S.D. CA 1988). Just such inadequate articulation is in evidence in this case.

Granite Rock, the Cities applied for the local permit, and there is now a record showing the reasons for rejection by the local authority, i.e. a record establishing the irreconcilable conflict. Indeed, this Court is now faced with a *local* entity attempting to enforce what has been determined by the Tenth Circuit to be *local* regulations, *City and County of Denver v. Bergland*, 695 F.2d 465, 485 (10th Cir. 1982), and to either absolutely *prohibit* the activity, in the case of the Board, or to impose conditions so severe as to make the Project commercially impracticable, in the case of the Planning Commission. Thus, not only is the *state* regulatory scheme required by *Granite Rock* absent, but even if regulations in question were being imposed by the state, they would not pass the "reasonableness" test.

In addition, the County is in fact attempting to impose "land use regulations," not environmental regulations. This includes those regulations adopted under § 24-65.1-101, *et seq.*, 10B C.R.S. (1988), which have been characterized by the legislature as "land use planning" tools and codified as part of the land use planning statutes.[18] See § 24-65.1-101(1)(c), 10BC.R.S. (1988). The "situation in the present case is the very result feared by the dissenting opinion in *Granite Rock*, i.e. "duplicative" processes wherein a local regulator has given itself final

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[18] In *City and County of Denver v. Bergland*, 517 F.Supp. 155, 174 n.18 (D.C. CO 1981), even Grand County seemingly admitted that its 1041 regulations fell within the category of "police power regulations involving land use, construction permits and zoning," i.e. land use regulation.

authority to determine how federal lands are to be used. *Granite Rock,* L.Ed.2d at 602.

Indeed, J. Scalia ends his opinion with the following observation:

> If environmental control is, as California now assures us, its limited objective in this case, then *it must simply achieve that objective by means other than a land use control scheme.* If and when it does so, we may have occasion to decide (as we need not today) whether state environmental controls are also pre-empted. More likely, however, the question will not arise in the future, as it has not arisen in the past, because of the Federal Governments voluntary accommodation of state environmental concerns – an accommodation that could not occur here only because California neglected to participate in the proceedings.

Not only has the above-referenced "accommodation" occurred in this instance, but the County persists in its attempt to impose its own controls through its local land use plan. This Court cannot allow such an outcome. *Brubaker v. Board of County Commissioners, supra,* is the controlling law in Colorado and its analysis dictates the result in this litigation. Federal pre-emption must be found to exist.

* * *

DISTRICT COURT, COUNTY OF EAGLE, STATE OF COLORADO

Civil Action No. 88CV142

MEMORANDUM BRIEF IN RESPONSE TO EAGLE COUNTY'S MOTION TO DISMISS

CITY OF COLORADO SPRINGS AND
CITY OF AURORA,
Colorado municipal corporations,

Plaintiffs,

vs.

1. THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF EAGLE, STATE OF COLORADO;
2. GEORGE A. GATES, DONALD H. WELCH, RICHARD L. GUSTAFSON, in their official capacities as individual members of said Board;
3. THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF EAGLE, STATE OF COLORADO, in its capacity as the permitting authority under § 24-65.1-101, *et seq.*, C.R.S.;
4. THE EAGLE COUNTY PLANNING COMMISSION;
5. CHARLES RIDGWAY, DAVID SLEMON, DENNIS GELVIN, DONALD PRICE, in their official capacities as individual members of said Commission;
6. THE COUNTY OF EAGLE, STATE OF COLORADO;
7. AVON METROPOLITAN DISTRICT;
8. TOWN OF AVON, COLORADO;
9. COLORADO COUNCIL OF TROUT UNLIMITED;

10. COLORADO RIVER OUTFITTERS ASSOCIATION;

11. DIVISION OF WILDLIFE, STATE OF COLORADO;

12. EAGLE COUNTY SHERIFF, in his official capacity;

13. HOLY CROSS WILDERNESS DEFENSE FUND;

14. JAMES FRANKLIN LAMONT;

15. RED CLIFF WATER AND SANITATION DISTRICT;

16. TOWN OF EAGLE, COLORADO;

17. TOWN OF GYPSUM, COLORADO;

18. TOWN OF MINTURN, COLORADO;

19. TOWN OF REDCLIFF, COLORADO;

20. TOWN OF VAIL, COLORADO;

21. UPPER EAGLE REGIONAL WATER AUTHORITY;

22. UPPER EAGLE VALLEY SANITATION DISTRICT;

23. VAIL VALLEY CONSOLIDATED WATER DISTRICT;

24. VAIL ASSOCIATES, INC.; and

25. EAGLE COUNTY HISTORICAL SOCIETY,

Defendants.

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* * *

I. PLAINTIFFS HAVE STANDING TO ASSERT THEIR SIXTH AND TWELFTH CLAIMS FOR RELIEF AS HOME RULE MUNICIPALITIES IN THEIR CAPACITY AS OWNERS OF CERTAIN DECREED CONDITIONAL WATER RIGHTS.

A. The "per se" exclusionary rule on standing, as developed by the federal courts, should not apply.

Defendants assert that Plaintiffs have no standing to bring the Sixth and Twelfth Claims. Defendants' assertion is not based upon the standing test announced in *Wimberly v. Ettenberg*, 194 Colo. 163, 470 P.2d 535 (1979), i.e. "[t]he proper inquiry on standing is whether the plaintiff has suffered injury in fact to a legally protected interest as contemplated by statutory or constitutional provisions." *Wimberly, supra* at 168. Rather, Defendants assert that the mere identity of Plaintiffs is an absolute bar to standing. That is to say, Plaintiffs are precluded "per se" from bringing such claims.

Defendants rely entirely on a line of cases which, they claim, hold that a municipality can never have standing to sue the state of which it is a creature or the political subdivisions of that state. Defendants then assert that the Colorado Supreme Court has recently adopted this position in a footnote (dicta) to *Town of Orchard City v. Board of County Commissioners of Delta County*, 751 P.2d 1003 (Colo. 1988). However, a close examination of both the applicable federal and Colorado cases upon the subject inexorably lead to a different conclusion.

One must start such an examination with a review of Justice White's dissent from the denial of certiorari in

City of Lake Tahoe v. California Tahoe Regional Planning Agency, 449 U.S. 1039, 66 L.Ed.2d 502, 101 S.Ct. 619 (1980) which is also cited by the Colorado Supreme Court in the *Orchard City* footnote quoted by Defendants. In that dissent, Justice White was critical of what he termed the "per se rule" of no standing as cited by Defendants herein, finding it to be inconsistent with the decision in *Board of Education v. Allen*, 392 U.S. 236 (1968). In addition, he referenced *Rogers v. Brockette*, 588 F.2d 1057 (5th Cir. 1979), upon which a conflicting line of cases has developed.

The *Rogers* court held that while some of the language in the opinions cited by Defendants is indeed broad enough to seemingly support Defendants' argument, said decisions, properly interpreted, do not support the conclusions advocated by Defendants. *Rogers v. Brockette*, 588 F.2d at 1067-1071. As explained by the *Rogers* court, the line of cases relied upon by the Defendants are the descendants of *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 4 L.Ed 629 (1919) wherein New Hampshire was prohibited from modifying a charter that the colonial government had issued to Dartmouth College by virtue of the contract clause to the U.S. Constitution. In the famous dicta to that decision, Chief Justice Marshall sought to avoid a situation wherein citizens of the state could claim they had a "contract" with the state, because such an interpretation would bar the state from impairing any such contract. This would leave a state practically unable to legislate or allocate political power within its subdivisions. Justice Marshall's solution was to enunciate the principle that certain guarantees of the U.S. Constitution should not be

interpreted to interfere with a state's control over the allocation of its political powers.[1]

In *Rogers*, Judge Goldberg also described *Trenton v. New Jersey*, 262 U.S. 182, 43 S.Ct. 534, 67 L.Ed 937 (1923), which is cited by Defendants, as "typical" of the series of cases following *Dartmouth*. *Rogers v. Brockette*, 588 F.2d at 1067. In that case, the state modified a charter that it had previously given to the municipality. In holding that the municipality had no standing, the Court extensively quoted from *Hunter v. Pittsburgh*, 207 U.S. 161, 178, 179, 52 L.Ed. 151, 159, 160, 28 S.Ct. 40 (1907), which is "usually considered the leading example." *Rogers v. Brockette*, 588 F.2d at 1067.[2] However, when these cases were decided,

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[1] The line of cases that followed *Dartmouth* were faithful to Justice Marshall's holding that the Constitution does not interfere with the internal political organization of states. In each case the Court reviewed the merits of the claim, and determined that the municipality had no right under the particular constitutional provisions it invoked. Although these decisions were framed in terms of standing, the decisions are actually substantive interpretations of the constitutional provisions involved in those cases. *Rogers v. Brockette*, 588 F.2d at 1070.

[2] The Hunter case, which involved a consolidation of the cities of Allegheny and Pittsburgh, contains a classic description of the unlimited power of states over municipalities. Its rationale is that municipal corporations, as "creatures of the state," exist by virtue of legislative enactments and can at any time be terminated by the State. Other decisions in this line of cases speak of a theoretical unity of interests, intramural disputes between political subdivisions charged with the same statewide goal, and the incongruity of a subordinate local agency suing its administrative and supervisory superior over the state allocation of political power. The logic of these decisions is that the boundaries of a municipality were given by the State and a municipality has no property right to those boundaries as

"standing" meant something different from what it means today. *Rogers v. Brockette*, 588 F.2d at 1070. The old legal standing test went to the merits of the case. *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150, 153 (1970). However, by resolving these substantive issues under the rubric of standing principles, these decisions have been misinterpreted as a broad denial of access to the courts. As a result, substantive issues have become distorted and parties have been deprived of the full consideration they deserved. *Municipal Corporation Standing To Sue The State: Rogers v. Brockette*, 93 Harv.L.Rev. 586 at 590, 591 (1980).[3] Plaintiffs submit that the Supreme Court implicitly acknowledged, in *Hunter v. Pittsburgh*, that a municipality can raise the claim that its "private" contract and property rights have been

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against its creator. Cf: *Township of River Vale v. Town of Orangetown*, 403 F.2d 684 (2nd Cir. 1968) (municipality is a person within meaning of Fourteenth Amendment); *City of Santa Clara v. Andrus*, 572 F.2d 660 (9th Cir. 1978).

[3] The existing degree of confusion is illustrated by the fact that *Rogers v. Brockette* is confirmed by the same line of cases cited by Defendants. As Judge Goldberg points out, the *Hunter* court said:

> It will be observed that, in describing the absolute power of the state over the property of municipal corporations, *we have not extended it beyond property held or used for governmental purposes.* Such corporations are sometimes authorized to hold and do hold property *for the same purposes that property is held by private corporations or individuals* . . . it has been held that, as to the latter class of property, the legislature is not omnipotent. (emphasis added) 28 S.Ct. at 47.

Rogers v. Brockette, 588 F.2d at 1069.

impaired. Such is explicitly stated by Justice Goldberg in *Rogers v. Brockette*, 588 F.2d at 1069, 1070.

The Supreme Court subsequently discussed its prior decisions in this area in *Gomillion v. Lightfoot*, 364 U.S. 339, 5 L.Ed. 110, 81 S.Ct. 125 (1960). While recognizing that the numerous decisions dealing with the creation of municipalities and with taxation clearly state that the Due Process Clause affords no immunity against "mere inequalities in tax burdens . . . as an indirect consequence of a State's exercise of its political powers", the Court noted that the *Hunter* opinion itself "intimates that a state legislature may not be omnipotent even as to the disposition of some types of property owned by municipal corporations." *Gomillion, supra*, 5 L.Ed. at 114 and 115. The Court warned that "exalting" the State's political power to an absolute would "misconceive the reach and rule" of *Hunter* and related cases relied upon by Defendants and stated:

> . . . a correct reading of this seemingly unconfined dicta of *Hunter* and kindred cases is not that the State has plenary power to manipulate in every conceivable way, for every conceivable purpose, the affairs of its municipal corporations, but rather that the State's authority is unrestrained by the particular prohibitions of the Constitution considered in those cases.

Gomillion v. Lightfoot, 5 L.Ed.2d at 114-115.

Thus, as noted above, a number of courts have called the "per se rule" into question. This includes one of the cases cited by Defendants, *U.S. v. State of Alabama*, 791 F.2d 1450 (4th Cir. 1986). The court in *U.S. State of Alabama* held that the per se rule did not apply in that circuit,

but went on to hold that *"[i]n the instant case, . . .* ASU . . . may not raise a Fourteenth Amendment claim . . . ." (emphasis added). In that case, Alabama State University was attempting to realign itself as a plaintiff in a case against the State Board of Education. Nevertheless, it is significant that the *U.S. v. Alabama* court upheld the rights of individual intervenors to maintain the action against the Board of Education. This is essentially the position taken by the Colorado Supreme Court in the *Orchard City* case cited above, where individual citizens were allowed to pursue the tax dispute against the county.

Unless this Court wishes to add individual citizens of Colorado Springs and Aurora as Plaintiffs to this action, the present Plaintiffs are arguably the only parties that may present the constitutional issues which are correctly invoked in the present case. If defendants succeed in advancing their distorted view of standing, the Defendants would be insulated from scrutiny. However, a careful review of the issues in the instant case reveals that the cases cited by Defendants are not dispositive of this dispute, as a "per se" rule should not apply, and, in fact, has never been applied by the Colorado courts.

* * *

C. Plaintiffs have standing in their proprietary capacity.

Further, in the Sixth and Twelfth Claims for Relief, Plaintiffs are before this Court in a dual capacity, i.e. in their governmental capacity and in their proprietary capacity as the owners of decreed conditional water

rights. Defendants' argument improperly concentrates exclusively on the first capacity. However,

> . . . it is well settled that a city in operating a water works system acts in its proprietary or business, and not in its political or governmental capacity, and in so acting is governed by the same rules that apply to a private corporation.

County of Larimer v. City of Fort Collins, 68 Colo. 364, 367, 189 P. 929, 930 (1920). Although the distinction between "governmental" and "proprietary" capacity has been criticized and/or abolished for liability purposes, *Clark v. Town of Estes Park,* 686 P.2d 777 (Colo. 1984), the Colorado Supreme Court (en banc) has reaffirmed the distinction in municipal water supply cases as recently as 1985. *Denver v. Colorado River Water Conservation District,* 696 P.2d 730 (Colo. 1985).

The "per se" rule only makes sense where the cases deal with deliberate allocations of political authority between the state and its political subdivisions. None of the rationale about "creatures of the state" is relevant where, as here, the municipality is acting in a proprietary capacity in the clearest sense of that distinction.[5]

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[5] It cannot be forgotten that Plaintiffs are acting as water utilities in the development of those water rights for which county permits are being sought. It is generally recognized that public utilities possess constitutional due process rights. *See: Long Island Lighting Co. v. Cuomo,* 666 F.Supp. 370 (N.D. N.Y. 1987); *Potomac Elec. Power v. Dist. of Columbia Gov.,* 651 F.Supp. 907 (D. D.C. 1986).

D. The "per se" exclusionary rule on standing does not apply to Colorado home rule municipalities.

In addition, the "creature of the state" rationale can never apply to home rule municipalities in the State of Colorado. The home rule provisions of the Colorado Constitution provide that Plaintiffs are no longer creatures of the state legislature but derive their powers directly from the Colorado Constitution.

> The very essence of a "Home Rule City" is embodied in the constitutional mandate that in its local and municipal affairs the City has full, complete and exclusive authority. The legislature is powerless to change this essential concept of home rule.

Four-County Metropolitan Capital Improvement District v. Board of County Commissioners, 149 Colo. 284, 304, 369 P.2d 67 (1962). The language found in *Hunter* and *Trenton* allowing the state "at its pleasure" to "modify or withdraw all such powers", to "take without compensation such property", "repeal the charter, and destroy the corporation" is simply not relevant.

In fact, the Colorado Supreme Court has recently ruled that home rule cities have standing to challenge the validity of state statutes under certain circumstances. In *Denver Urban Renewal Authority v. Byrne,* 618 P.2d 1374 (Colo. 1980), the Court reviewed the rationale of the per se rule, noting a number of cases which held that political subdivisions of the state exist only "for the convenient administration of the state government, created to carry out the will of the state." The Court harmonized this rule with the standing rule in *Wimberly v. Ettenberg supra,* by

reasoning that while political subdivisions of the state may have suffered an injury, the "difficult question is whether a legally protected interest is implicated." *Denver Urban Renewal Authority v. Byrne,* 618 P.2d at 1380. The Court ruled that the Colorado Constitution confers a legally protected interest in local concerns upon a home rule city which is not inferior to the General Assembly. *Denver Urban Renewal Authority v. Byrne,* 618 P.2d at 1381. In so holding, the Court quoted *Four-County, supra:*

> In numerous opinions handed down by this court extended over a period of fifty years, it has been made perfectly clear that when the people adopted Article XX they conferred *every power* theretofore possessed by the legislature to authorize municipalities to function in local and municipal affairs. (emphasis in original.) 360 P.2d at 72.

The result does not change when the issue is one of statewide concern. Although Plaintiffs maintain in their Second and Third Claims for Relief that the activities in issue are matters of local concern, Plaintiffs would still have standing if the issue was held to be one of statewide concern. In *City of Colorado Springs v. State of Colorado,* 626 P.2d 1122 (Colo. 1981), the City was found to have standing to argue constitutional violations, the Court holding that a matter of statewide concern (establishment of firemen's pension plans) was a local matter to the extent to which a home rule city must budget, assess and collect taxes to provide financial support for the plan. "To hold that no injury in fact would result to the city's constitutionally protected interests . . . would be to ignore realities of local government." *City of Colorado Springs v. State,* 626 P.2d at 1127. Similarly, in the present instance, the

development and use of the Cities water rights involves the exercise of purely local prerogatives which must be respected.

* * *

COURT OF APPEALS, STATE OF COLORADO

Case No. ___

NOTICE OF APPEAL

DISTRICT COURT, COUNTY OF EAGLE,
STATE OF COLORADO Civil Action No. 88CV142,
Judge William L. Jones

CITY OF COLORADO SPRINGS
AND CITY OF AURORA,
Colorado municipal corporations,

Plaintiffs-Appellees,

v.

1. THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF EAGLE, STATE OF COLORADO;
2. GEORGE A. GATES, DONALD H. WELCH, RICHARD L. GUSTAFSON, in their official capacities as individual members of said Board;
3. THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF EAGLE, STATE OF COLORADO, in its capacity as the permitting authority under § 24-65.1-101 *et seq.*, C.R.S.;
4. THE EAGLE COUNTY PLANNING COMMISSION;
5. CHARLES RIDGWAY, DAVID SLEMON, DENNIS GELVIN, DONALD PRICE, in their official capacities as individual members of said Commission;
6. THE COUNTY OF EAGLE, STATE OF COLORADO;
7. AVON METROPOLITAN DISTRICT;
8. TOWN OF AVON, COLORADO;

9. COLORADO COUNCIL OF TROUT UNLIMITED;
10. COLORADO RIVER OUTFITTERS ASSOCIATION;
11. EAGLE COUNTY SHERIFF; in his official capacity;
12. HOLY CROSS WILDERNESS DEFENSE FUND;
13. RED CLIFF WATER AND SANITATION DISTRICT;
14. TOWN OF EAGLE, COLORADO;
15. TOWN OF GYPSUM, COLORADO;
16. TOWN OF MINTURN, COLORADO;
17. TOWN OF REDCLIFF, COLORADO;
18. TOWN OF VAIL, COLORADO;
19. UPPER EAGLE REGIONAL WATER AUTHORITY;
20. UPPER EAGLE VALLEY SANITATION DISTRICT;
21. VAIL VALLEY CONSOLIDATED WATER DISTRICT;
22. VAIL ASSOCIATES, INC.; and
23. EAGLE COUNTY HISTORICAL SOCIETY,

Defendants-Appellants.

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* * *

5. Whether the Board is prohibited on federal pre-emption grounds from regulating federally-approved activities on U.S. Forest Service lands in order to mitigate or reduce their environmental impacts, and whether the Court's invalidation of the Board's findings numbered I(6, 10, 19), II(14, 15), III(A) (1,2), III(B)(1, 2), IV(1, 2) on that basis was proper.

* * *

COURT OF APPEALS, STATE OF COLORADO

Case No. 93CA386

NOTICE OF CROSS-APPEAL

CITY OF COLORADO SPRINGS
AND CITY OF AURORA,
Colorado municipal corporations,

Plaintiffs-Appellees/Cross-Appellants,

vs.

1. THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF EAGLE, STATE OF COLORADO;
2. GEORGE A. GATES, DONALD H. WELCH, RICHARD L. GUSTAFSON, in their official capacities as individual members of said Board;
3. THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF EAGLE, STATE OF COLORADO, in its capacity as the permitting authority under § 24-65.1-101 *et seq.*, C.R.S.;
4. THE EAGLE COUNTY PLANNING COMMISSION;
5. CHARLES RIDGWAY, DAVID SLEMON, DENNIS GELVIN, DONALD PRICE, in their official capacities as individual members of said Commission;
6. THE COUNTY OF EAGLE, STATE OF COLORADO;
7. AVON METROPOLITAN DISTRICT;
8. TOWN OF AVON, COLORADO;
9. COLORADO COUNCIL OF TROUT UNLIMITED;
10. COLORADO RIVER OUTFITTERS ASSOCIATION;
11. EAGLE COUNTY SHERIFF, in his official capacity;

12. HOLY CROSS WILDERNESS DEFENSE FUND;
13. RED CLIFF WATER AND SANITATION DISTRICT;
14. TOWN OF EAGLE, COLORADO;
15. TOWN OF GYPSUM, COLORADO;
16. TOWN OF MINTURN, COLORADO;
17. TOWN OF REDCLIFF, COLORADO;
18. TOWN OF VAIL, COLORADO;
19. UPPER EAGLE REGIONAL WATER AUTHORITY;
20. UPPER EAGLE VALLEY SANITATION DISTRICT;
21. VAIL VALLEY CONSOLIDATED WATER DISTRICT;
22. VAIL ASSOCIATES, INC.; and
23. EAGLE COUNTY HISTORICAL SOCIETY,

Defendants-Appellants.

This cross-appeal is initiated by Plaintiffs-Appellees/Cross-Appellants, City of Colorado Springs and City of Aurora, Colorado home rule municipal corporations.

* * *

II. ISSUES TO BE RAISED ON APPEAL

1. Are the Cities "citizens" for purposes of the Fifth and Fourteenth Amendments of the U.S. Constitution, with standing to pursue alleged due process violations, including the taking of property without just compensation?

* * *

COLORADO COURT OF APPEALS Tr. Ct. No. 88CV142

Case No. 93 CA 386 and 93 CA 412

COMBINED ANSWER AND REPLY BRIEF OF PLAINTIFF-APPELLANTS, CROSS-APPELLANTS, THE CITIES OF AURORA AND COLORADO SPRINGS

CITY OF COLORADO SPRINGS AND
CITY OF AURORA,
Colorado municipal corporations,

Plaintiffs-Appellants-Cross-Appellees,

v.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF EAGLE, STATE OF COLORADO; GEORGE A. GATES, JOHNETTE PHILLIPS, JAMES E. JOHNSON, JR., in their official capacities as individual members of said Board; THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY EAGLE, STATE OF COLORADO, in its capacity as the permitting authority under §24-65.1-101 *et seq.*, C.R.S.; THE EAGLE COUNTY PLANNING COMMISSION; MARK DONALDSON, ROBERT TETHER, ARLENE QUENON, ROBERT MORRIS, DONALD PRICE, in their official capacities as individual members of said Commission; THE COUNTY OF EAGLE, STATE OF COLORADO; HOLY CROSS WILDERNESS DEFENSE FUND; and VAIL VALLEY CONSOLIDATED WATER DISTRICT.

Defendants-Appellees-Cross-Appellants.

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* * *

B. THE COUNTY REGULATIONS WERE PREEMPTED UNDER STATE AND FEDERAL LAW.

1. The County Land Use Controls Were Pre-Empted Under Federal Law.

The District Court, relying upon the decisions in *Brubaker v. Board of County Comm'rs, El Paso County,* 652 P.2d 1050 (Colo. 1982) and *California Coastal Comm'n v. Granite Rock Co.,* 480 U.S. 572 (1987), correctly concluded that the County could not impose land use regulations upon this project, which is located entirely on federal lands.[12] In arguing to the contrary, defendants once again misconstrue both the operative facts and the law.

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[12] Though Defendants attempt to characterize many of the local regulations as "environmental" in nature, they are in fact land use determinations. The "quality and quantity of the river rafting experience" is a land use decision, i.e., will the County have water diversions or aquatic playgrounds. Similarly, regulation of the area as a "wilderness" is a land use choice. Though

Typical of the Fund's outright misrepresentation of the facts is its assertion on page 15 of its Brief that the federal permits obtained by the Cities indicated that a local 1041 permit was required. The permit actually provides:

> Eagle County and other Counties advise the Forest Service that various permits are needed. These permits would include:
>
> (2) Permits pursuant to Eagle County's or other Counties H.B.-1041 process.

Hence, the Forest Service merely acknowledged that it had been "advised" by the County that, in the opinion of the County, a 1041 permit was necessary. This certainly falls far short of a federal requirement that such a local permit be obtained.

Defendants also conveniently choose to *ignore* certain significant facts. As previously indicated, the City's project is to be located entirely upon federal Forest Service lands. The Forest Service Management Plan (Record Volume I, Exhibit A-11) specifically states that the White River National Forest is for *multiple use*. This is consistent

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water quality can be characterized as an environmental concern, water rights are an individual property interest in Colorado, and protection thereof from alleged degradation is thus more akin to land use control. Further, the "nuisance factors" referenced in the Board's findings have been historically characterized as matters within the ambit of the local "zoning" authority. *See Robinson Brick Co. v. Luthi*, 115 Colo. 106, 111, 169 P.2d 171 (1946); *C&M Sand and Gravel v. Board of County Comm'rs*, 673 P.2d 1013, 1017 (Colo. App. 1983). *See also* Finding III(A)(1), (B)(1), Addendum 14 at p. 169, 170.

with the language of the Federal Land Policy Management Act ("FLPMA"), 43 U.S.C. §1701, 1732 (1986), the National Forest Management Act, 16 U.S.C. §1600 (1985), *et seq.*, the Organic Act of 1897, 16 U.S.C. §481 (1985), and the Multiple Use Sustained Yield Act, 16 U.S.C. §528 (1985), *et seq.* Included within the uses encouraged by each of these Acts is water resource development. For example, the Organic Act specifically provides:

> All waters within the boundaries of national forests may be used for domestic, mining, milling, or irrigation purposes, under the laws of the state wherein such national forests are situated or under the laws of the United States and the rules and regulations established thereunder.

16 U.S.C. §481.[13]

Further, pursuant to federal requirements under the National Environmental Policy Act ("NEPA"), 42 U.S.C. §4321 (1977 and 1993 Supp.), *et seq.*, the Forest Service performed an environmental analysis which lead to a number of public hearings, the submission of numerous written comments, and the eventual issuance of a final environmental impact statement (FEIS). (Record Volume

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[13] As noted in *United States v. City and County of Denver*, 656 P.2d 1, 23 (Colo. 1982):

> The Supreme Court in *United States v. New Mexico, supra*, emphasized that Congress intended to provide large quantities of water for the economic development of the West when it passed the Organic Act of 1897.

See also U.S. v. Jesse, 744 P.2d 491, 502 (Colo. 1987) (Organic Act provides for and contemplates the diversion of water by private parties within the national forests in accordance with state law).

I, Exhibit A-1.) Eagle County and the other defendants took an active role in this environmental review process, Addendum 35, pp. 393-395; Record Volume I, Exhibit A-1), and had numerous opportunities to place their concerns of record in order to have them addressed by the federal agencies.[14]

Defendants also ignore the fact that the Cities obtained a FLPMA permit (Addendum 11) which sets forth numerous mitigation measures designed to ensure that the project was constructed and operated in an environmentally sound fashion. In addition, the Cities applied for and received a §404 permit (33 U.S.C. §1344 (1986)) from the Corps of Engineers. Addendum 12. This permit embodied conditions addressing various environmental issues including aesthetics, water quality, and wetlands preservation. Supplementing the "no loss" of wetlands provision, was a requirement that any mitigation utilized in conjunction with the wetlands mitigation plan "shall not cause more than minimal visual intrusion to the wilderness area, and shall not have significant environmental impacts." Addendum 12, p. 127. The

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[14] The County did note an indication of "deficiencies in the Environmental Impact Statement," (Addendum 14, p.168), without tying this finding to any local criteria. If the County was dissatisfied with the EIS process, it could have sought review thereof. It failed to do so. Further, to the extent the County and the remaining defendants claim that the federal agencies used different standards than applied by the County, the only applicable county criteria references "no significant deterioration of wetlands." To argue that the Forest Service and Corps of Engineers did not address this basic issue under their extensive federal regulatory requirements is patently ridiculous. *See, e.g.*, 33 C.F.R. Part 320, 40 C.F.R. Part 230.

Corps specifically found the permitted alternative to be consistent with §§101, 401 and 404 of the Clean Water Act, NEPA, the Endangered Species Act, the Fish and Wildlife Coordination Act, policies concerning scenic and recreational values, and policies concerning energy conservation. Addendum 12, pp. 133-134.

Nevertheless, despite the above approvals and the numerous protective conditions contained therein, despite defendants' participation in the federal process, and despite the location of the project on federal lands, the requested local land use permits were denied.[15] With the above factual background in mind, a closer analysis of the decisions in *Brubaker* and *Granite Rock, supra,* is required.

(a) The district court correctly relied upon the Brubaker decision.

In *Brubaker,* plaintiffs sought from the County Board a special use permit for purposes of conducting certain mining operations which had previously received federal approval. The County denied the application. The Colorado Supreme Court held that such a denial was pre-

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[15] Regulations adopted under C.R.S. §24-65.1-101, *et seq.* (1990), have been characterized by the legislature as "land use planning" tools and codified as part of the land use planning statutes. *See* C.R.S. §24-65.1-101(1)(c) (1990). In *City and County of Denver v. Bergland,* 517 F.Supp. 155, 174, n. 18 (D. Colo. 1981), even the County seemingly admitted that its 1041 regulations fell within the category of "police power regulations involving land use, construction permits and zoning," i.e., land use regulation.

empted by federal law, as it stood as an "obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Brubaker,* 652 P.2d at 1055. Simply stated, "[S]uch *a veto power* is not consistent with the Supremacy Clause." (Emphasis added.) *Id.* at 1056. In so holding, the *Brubaker* court cited with approval the decision of the Ninth Circuit in *Ventura County v. Gulf Oil Corp.,* 601 F.2d 1080 (9th Cir. 1979) aff'd mem 445 U.S. 947 (1980), wherein Gulf sought to secure from the County an open space permit prior to undertaking its mineral exploration activities on federal lands within the County. *Id.* at 1056. In holding that the governing federal legislation pre-empted such County regulation due to an impermissible conflict between the two bodies of law, the Ninth Circuit observed:

> Despite this extensive federal scheme reflecting concern for the local environment as well as development of the nation's resources, Ventura demands a right of final approval. Ventura seeks to prohibit further activity by Gulf until it secures an Open Space Use Permit which may be issued on whatever conditions Ventura determines appropriate, or which may never be issued at all. The federal Government has authorized a specific use of federal lands, and Ventura cannot prohibit that use, either temporarily or permanently, in an attempt to substitute its judgment for that of Congress.

Ventura County, 601 F.2d at 1084. *See also: Federal Power Comm'n v. Oregon,* 349 U.S. 435 (1955).[16]

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[16] The Ventura court further noted:

As Ventura recognized in filing its second amended complaint, the National Environmental Protection

Similarly, in the present instance, the County seeks to prohibit the federally authorized activity. Just as the test drilling in *Brubaker* was essential to establishing the mining claims in question therein, so too is the Cities' construction of its diversion facilities essential to the exercise of its federal easement rights and its decreed water rights.

Finally, the County simply misstates the facts in *Brubaker* when it alleges that "El Paso County attempted to categorically prohibit any drilling activity on federal land." Co. Br. at p. 27.

> The appellants then applied to the Board for a special use permit authorizing drilling of the proposed test holes in El Paso County. El Paso County considered the permit necessary because the appellant's mining claims in the County are located within an A-2 Agricultural zoning district, and "mineral and natural resources extraction" *is a permitted use only if such a permit is obtained.* (Emphasis added.)

Brubaker, 652 P.2d at 1053. In further explanation of its decision, the *Brubaker* court subsequently stated:

> In the present case, we are not presented with a challenge to the facial validity of the El Paso

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> Act ("NEPA") and the guidelines, regulations and Executive Orders issued in pursuance of that Act, mandate extensive federal consideration and federal-local cooperation concerning the local, environmental impact of federal action under the Mineral Lands Leasing Act. If federal officials fail to comply with these requirements, Ventura has a remedy against those officials.

Id. at 1086.

> zoning ordinances or with the question of whether the appellants could be required to apply for a permit under those ordinances. Rather, we are faced with the issue reserved by the Court in *State ex rel Andrus v. Click, supra.* That is, *we consider a specific application of the local regulations* so as to prohibit activities authorized by federal legislation. (Emphasis added.)

Id. at 1059.[17] Thus, there was no "blanket" prohibition in *Brubaker,* but rather a fact specific prohibition evidenced by a permit denial.

(b) Granite Rock Supports a Finding of Pre-Emption.

The United States Supreme Court decision in *California Coastal Commission v. Granite Rock,* 480 U.S. 572 (1987) is consistent with the above observations, and defendants' reliance thereon is misplaced. Although the sharply divided court ruled that reasonable *state environmental regulations* covering Forest Service land were not per se pre-empted by federal law, the five-to-four majority described this holding as a "narrow" rejection of a "purely facial challenge." *Id.* at 580, 593. Granite Rock had not even applied for a state permit, arguing that there was no possible set of conditions that the state could place on its permit which would not conflict with federal law. It therefore had " . . . lost the possibility of

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[17] The issue reserved in *Andrus v. Click,* 97 Id 791, 554 P.2d 969 (1976), as described by the *Brubaker* court, involved " . . . the question of whether the state could deny such a permit" for activities on federal land. *Id.* at 1059.

making this argument [prohibition] in this litigation." *Id.* at 588.[18] The Court stressed that the state was not asking Granite Rock to comply with a *local* land use plan or zoning ordinance, but rather with the regulations of a *state* commission concerned over "compliance with the environmental criteria in *the Coastal Act itself.*" (Emphasis added.) *Id.* at 585, n. 2.

Further, the *Granite Rock* Court accepted the state's assertion that it did not seek to prohibit the activity, but only to regulate the environmental aspects thereof. *Id.* at 587. However, since Granite Rock had not applied for the state permit, it was unable to show the conditions which the state would have placed upon its permit. Given the "as yet unidentifiable conflicts with the federal scheme" and the "barren record," the court cautiously accepted the possibility that the state might impose *reasonable environmental controls.* (Emphasis added.) *Id.* at 594.[19]

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[18] Significantly, the majority decision assumed without deciding, an assumption deemed "correct" in the dissent by Justices White and Scalia and consistent with the decision in *Ventura County,* that "the combination of the NFMA and the FLPMA pre-empt the extension of state land use plans . . . in national forest lands." *Granite Rock,* 480 U.S. at 585, 612.

[19] Even environmental concerns, assuming they can be addressed by the local entity, cannot be of a general or generic character or they will run afoul of the pre-emption doctrine. As stated in *Ogden Environmental Services v. City of San Diego,* 687 F.Supp. 1436, 1448 (S.D. Ca. 1988):

> Allowing the local governments to impose a permit requirement and then to deny the permit on unspecified environmental grounds, without articulating specific health or safety concerns or setting forth particular environmental requirements which the facility must meet, surely frustrates congressional

Nevertheless, the Court cautioned that there could be "state environmental regulation so severe that a particular land use would become commercially impracticable."[20] *Id.* at 587.

The facts of the present case are distinguishable from those found in *Granite Rock,* and are on point with those in *Brubaker.* The County does seek to prohibit the activity in question. Unlike Granite Rock, the Cities applied for a local permit and are not making a facial challenge. There is now a record demonstrating the reasons for rejection by the local authority, i.e., a record establishing an irreconcilable conflict. Further, this court is now faced with a situation wherein a *local* entity is attempting to enforce what has been determined by the Tenth Circuit to be *local* regulations. *City and County of Denver v. Bergland,* 695 F.2d 465, 485 (10th Cir. 1982).[21] Thus, the *state* regulatory

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intent behind the whole research, development, and demonstration program.

Just such an inadequate articulation is in evidence in this case. *See also Ogden Environmental Services v. City of San Diego,* 692 F.Supp. 1222 (S.D. Ca. 1988).

[20] To the extent the County and the Fund now argue that the federal mitigation plan was inadequate, despite its operational flow release option, there is, in the minds of these defendants, no reasonable environmental regulation available for this project configuration. That is to say, any regulation would be so severe as to amount to a prohibition, the very exception to allowable environmental regulation noted in *Granite Rock,* 480 U.S. at 587.

[21] In reaching its conclusion that H.B. 1041 requirements were "local" in nature, the Tenth Circuit cited with approval the Ninth Circuit decision in *Columbia Basin Land Protection Association v. Schlesinger,* 643 F.2d 585 (9th Cir. 1981), wherein the Court found that

scheme required by *Granite Rock* is absent. *Granite Rock*, 480 U.S. at 583. Finally, even if the regulations in question were being imposed by the state, they would not pass the "reasonableness" test enunciated in *Granite Rock*. The identification of any shift in wetland species composition as an unacceptable "significant deterioration" was clearly unreasonable, as were any findings of nuisance or adverse impacts on aquatic life. *See* pp. 39-40, *infra*.[22]

The situation in the present case is the very result feared by the dissenting opinion in *Granite Rock*, i.e., "duplicative" processes wherein a local regulator has given itself final authority to determine how federal lands are to be used. *Id.* at 605. Indeed, Justice Scalia ends his opinion with the following observation:

> If environmental control is, as California now assures us, its limited objective in this case, then *it must simply achieve that objective by means other than a land use control scheme.* If and when it does so, we may have occasion to decide (as we need not today) whether state environmental controls are also pre-empted. More likely, however, the question will not arise in the future, as it has not arisen in the past, because the *federal government's voluntary accommodation of state environmental concerns – an accommodation that could not occur here only because California neglected to participate in the proceedings.* (Emphasis added.)

"state" standards do *not* include "local" requirements. *See also Citizens for a Better Henderson v. Hodel*, 768 F.2d 1051, 1055 (9th Cir. 1985).

[22] It should also be noted that in *Granite Rock* the regulating authority had not participated in the federal permit process.

Id. at 614. Despite the fact that the above-referenced "accommodation" occurred in this instance through the federal permitting processes, the County persists in its attempt to impose its own controls through its local land use plan. That attempt cannot be sustained.[23]

* * *

E. THE CITIES HAVE STANDING TO ASSERT DUE PROCESS RIGHTS.

The Cities were required to apply to the County for permits in the same manner as any property owner because the Cities are expressly defined as "persons" within the meaning of the enabling legislation. C.R.S. §§24-65.1-102(6) and 24-65.1-501(1)(a) (1990). *Grand County,* 782 P.2d at 764. As such "persons," the Cities are entitled to the same legislative assurance that their

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[23] The County also misstates the holding of the Court in *Friends of the Earth v. U.S. Navy,* 841 F.2d 927, 936 (9th Cir. 1988), when it argues that "the Court rejected the Navy's argument, finding that the state act's combination of land use and environmental regulations did not mandate any particular use of the land . . . and was therefore not pre-empted." Co. Br. at 29. Rather, the court *rejected* application of that portion of the regulation dealing with land use, finding that it indeed was pre-empted and merely allowed the application of "environmental regulations." *Id.* at 936.

property rights will be protected.[65] C.R.S. §24-65.1-106(1)(a) (1990) provides "[n]othing in this article shall be construed as . . . diminishing the rights of owners of property as provided by the state Constitution or the Constitution of the United States." The constitutional rights of owners include the rights to just compensation when land use regulations are used to accomplish a "taking" of property. *Keystone Bituminous Coal Association v. DeBenedictis* 94 L.Ed.2d 472, 107 S.Ct. 1232 (1987). Nevertheless, the County now comes full circle and argues that the Cities are not entitled to their Fifth or Fourteenth Amendment rights because they are not "persons."

The Defendants again rely upon a line of cases which are designed to keep the courts out of intermural disputes between political subdivisions of the same state. Most of the cases cited by Defendants in support of the "per se" rule involve some sort of taxation issue; all of the cases involve disputes over the state allocation of political power. However, the instant case does not involve an internal dispute. It concerns, instead, the regulatory taking of the property interests of these statutory "persons".

Defendants ignore blackletter law cited at pages 28 and 29 of the Cities' Opening Brief concerning a municipality's right to just compensation, claiming that said

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[65] The gravamen of the Cities' Sixth and Twelfth Causes of Action is that the Cities, as owners of decreed water rights, have been deprived of those rights by a regulatory taking. The water rights in question were *not* allocated to the Cities by the State. Rather, these property rights were purchased by the Plaintiffs as home rule cities.

authority applies only to "formal condemnation cases." However, if municipalities are absolutely barred from asserting substantive due process or regulatory taking claims as the Defendants contend, there would be no reason for any state to institute such "formal condemnation" proceedings. The state could simply create regulations which accomplish the same goal. The Supreme Court has held that even

> Congress could not, without making provision for payment of compensation, pass a law depriving a State of land vested in it by the Constitution. Such a law . . . would constitute a taking of the State's property without just compensation, in violation of the Fifth Amendment.

Block v. North Dakota, 461 U.S. 273, 291, 856 (1983).

The absurdity of the "per se" rule has gradually lead to the more rational line of cases cited at pp. 21-23 of Plaintiffs' Brief. The Defendants have attempted to mischaracterize these decisions, but the referenced opinions continue to be offered as authority that "judicial support for this [per se] rule may be waning with time." *Amato v. Wilents*, 952 F.2d 742, 754-755 (3rd Cir. 1991).

Defendants fall back on *City of Trenton v. New Jersey*, 262 U.S. 182 (1923), claiming that the facts of *Trenton* are "very similar" to the instant case. Co. Br. at 41, n. 15. However, *Trenton* involved disputed taxation issues rather than a regulatory taking. Moreover, *Trenton* is based upon a "creature of the state" rationale. As a result, it did not apply when another New Jersey municipality was allowed to use the Fourteenth Amendment to challenge the zoning of an adjoining New York municipality.

Town of River Vale v. Town of Orangetown, 403 F.2d 684 (2nd Cir. 1968).

The Colorado Supreme Court cited the *River Vale* case in *Board of County Comm'rs v. City of Thornton*, 629 P.2d 605, 611 (1981), where the Court held that Thornton, as a home rule city and as the owner of property adjacent to the zoned property, had standing to challenge an Adams County zoning plan. The Court specifically held that "we find no reason in policy to deny the landowner City the same right to challenge illegal zoning as we have accorded private landowners." *Id.* at 610, citing *River Vale* in recognition of "a due process dimension." *Id.* at 611.

Further, the Supreme Court has cautioned that the line of cases relied upon by Defendants are limited to their facts. *Gomillion v. Lightfoot*, 364 U.S. 339, 343 (1960). The Court warned that a "correct reading of the seemingly unconfined dicta" of these cases does not allow the state "plenary power to manipulate in every conceivable way, for every conceivable purpose, the affairs of its municipal corporations" and that "a state legislature may not be omnipotent even as to the disposition of some types of property owned by municipal corporations." *Id.* at 343 and 344.

Defendants also place a great deal of reliance upon a footnote to *Orchard City v. Delta County Comm'rs*, 751 P.2d 1003, 1006 (Colo. 1988), another taxation case. *Orchard City*, however, serves to illustrate the need to focus the standing question upon the circumstances of the case, rather than resorting to the rubric of a "per se" rule. First, *Orchard City* addressed the distribution of tax revenues

rather than a City's right to protect its purchased property rights. Second, *Orchard City* is not identified as a home rule municipality.[66] *Contra: Board of County Comm'rs v. City of Thornton, supra.* Finally, since it was not necessary for the court to address the equal protection argument, this footnote is clearly dicta.

The Cities are not asking the court to apply a mechanical standing argument, but rather seek the same standing as any property owner, consistent with their statutory designation as "persons." The County cannot deprive these statutory persons of their property rights by irrelevant criticism of the proprietary/governmental distinction. The County's reliance on the sweeping statements in *Trenton* clearly go beyond the scope of the taxation issues in that case. *See Gomillion, supra.*

The County also vainly argues that the Cities are not "persons" under 42 U.S.C. §1983, ignoring the more recent decision in *Santiago Collazo v. Franqui Acosta,* 721 F.Supp. 385 (D. Puerto Rico 1989) and relying upon *City of Safety Harbor v. Birchfield,* 529 F.2d 1251 (5th Cir. 1976). However, as the *Santiago* court explains, *Safety Harbor* relied upon *Monroe v. Pape,* 365 U.S. 167, (1961), which was overruled in *Monell v. Department of Social Services,*

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[66] Defendants attempt to avoid standing for home rule cities by citing *Village of Arlington Heights v. Regional Transportation Auth.,* 653 F.2d 1149 (7th Cir. 1981). However, home rule municipalities established under the Colorado Constitution stand on a different footing. They have standing even in cases involving taxation issues. *Denver Urban Renewal Auth. v. Byrne,* 618 P.2d 1374 (Colo. 1980). The state Supreme Court recently reiterated this home rule distinction. *Mesa Verde Co. v. Montazuma County,* 831 P.2d 482, 485 (Colo. 1992).

436 U.S. 658, 690 (1978). *Monroe* had held that municipalities were not "persons" liable under §1983. However, once *Monroe* was overruled, it became a strained analysis to hold that a municipal corporation was a "person" within one clause of §1983 (1981 and 1993 Supp.), but not a "person" within another clause of the same statute. *South Macomb Disposal Auth. v. Township of Washington*, 790 F.2d 500, 503 (6th Cir. 1986).

It is just as strained an analysis for the trial court to hold that the Cities are defined as "persons" by the statute (and therefore are not entitled to the exemptions ordinarily provided to home rule municipalities), while simultaneously depriving the Cities of the rights which they would clearly enjoy as "persons", if they were treated as private property owners rather than municipalities. Since the enabling legislation describes the Cities as "persons" and requires the Cities to apply for a permit, the Cities must be afforded the same rights expressly granted to all property owners affected by this statute. C.R.S. §24-65.1-501(1)(a) (1990).

* * *

COLORADO COURT OF APPEALS
No. 93CA0386
No. 93CA0412

PETITION FOR REHEARING
OF PLAINTIFFS-APPELLANTS

City of Colorado Springs and City of Aurora, Colorado, municipal corporations,

Plaintiffs-Appellants and Cross-Appellees,

v.

The Board of County Commissioners of the County of Eagle, State of Colorado; George A. Gates, Johnette Phillips, James E. Johnson, Jr., in their official capacities as individual members of said Board; The Board of County Commissioners of the County of Eagle, in its capacity as the permitting authority under §24-65-101 *et seq.*, C.R.S.; The Eagle County Planning Commission; Mark Donaldson, Robert Tether, Arlene Quenon, Robert Morris, Donald Price, in their official capacities as individual members of said commission; The County of Eagle, State of Colorado; Holy Cross Wilderness Defense Fund; and Vail Valley Consolidated Water District,

Defendants-Appellees and Cross-Appellants.

Appeal from the District Court of Eagle County
Honorable William L. Jones, Judge
No. 88CV142

Division III — JUDGMENT AFFIRMED
Opinion by JUDGE DAVIDSON — IN PART, REVERSED
IN PART, AND CAUSE
Jones, and Rothenberg,
JJ., concur — REMANDED WITH DIRECTIONS

Anderson, Gianunzio, Dude, Pifher & Lebel, P.C., Mark T. Pifher, William Kelly Dude, Colorado Springs, Colorado, for Plaintiffs-Appellants and Cross-Appellees

James R. Fritz, County Attorney, Eagle, Colorado; Holme Roberts & Owen, L.L.C., Dennis J. Herman, Henry W. Ipsen, Mary H. Stuart, Denver, Colorado for Defendants-Appellees and Cross-Appellants The Board of County Commissioners of the County of Eagle, State of Colorado; George A. Gates, Johnette Phillips, James E. Johnson, Jr.; The Board of County Commissioners of the County of Eagle, State of Colorado; The Eagle County Planning Commission; Mark Donaldson, Robert Tether, Arlene Quenon, Robert Morris, Donald Price; The County of Eagle, State of Colorado

Sierra Club Legal Defense Fund, Lori J. Potter, Denver, Colorado; Land and Water Fund of the Rockies, Frances M. Green, Boulder, Colorado.

* * *

3. The Court's decision not to address the preemption cases (page 7) is inappropriate even under the Court's strained interpretation of state law. Even assuming that the permit could be denied to a home rule municipality under the terms of the state statute, the preemption case law as cited in the briefs indicates that though local entities may "regulate" environmental

impacts, this is not a basis upon which to veto or deny permits for federally approved projects located entirely on federal lands. See Pl. Opening Br. at P. 10, Answer Br. at pp. 14-20, 36; See e.g. *Brubaker v. Board of County Commissioners,* 652 P.2d 1050, 1059 (Colo. 1982) citing *Andrus v Click,* 97 Id. 791, 554 P.2d 969 (1976) (permit denial constitutes prohibition of federally authorized activity). Finally, the cities have asserted that the "nuisance" regulations are "land use" concerns and thus preempted.

* * *

17. With reference to the standing/due process claims (pp. 28-32), the Court overlooks the fact that constitutionally created home rule powers control over enactments of the General Assembly even in matters of statewide concern. See e.g. *Denver v. Grand County,* 782 P.2d at 762; *City of Thornton,* 194 Colo. at 535. Further, the Court erroneously concludes that home rule municipalities are "creatures of the state." The Supreme Court has stated that "as a home rule city with its own constitutional underpinning, Denver was not a political subdivision of the state. . . . " *Mesa Verde County v. Montezuma County,* 831 P.2d 482, 485 (Colo. 1992). See also Pl. Opening Br. at p. 25. The Court ignores black letter law that municipalities are entitled to just compensation in such circumstances. See Pl. Opening Br. at pp. 28-29 citing *Nichols on Eminent Domain* and ALR.3d; See also 91 L.Ed.2d 582; *Metagorda County v. Russell Law,* 19 F.3d 215, 223 (5th Cir. 1994) (though the takings clause is couched in terms of "private property," it is recognized that the clause also applies to "independently held and controlled property of a state *or of a local subdivision.*") The Cities

purchased these water rights in the free market, and they cannot subsequently be taken without compensation. See *Worcester v. Worcester Consol. Street R. Co.*, 196 U.S. 539, 551 (1905). Finally, the Cities did not argue that the dicta in *Town of Orchard City* was "eroded" by a case decided seven years before (page 31), only that the *City of Montrose* decision indicated state Supreme Court acceptance of municipal use of the Fourteenth Amendment outside of the "taxation" context.

* * *

SUPREME COURT, STATE OF COLORADO

CASE NO. 94 SC 765

COLORADO COURT OF APPEALS, CASE NOS. 93CA0386, 93CA0412 EAGLE COUNTY DISTRICT COURT, CASE NO. 88CV142

PETITION FOR WRIT OF CERTIORARI

City of Colorado Springs and City of Aurora, Colorado, municipal corporations,

Petitioners,

v.

The Board of County Commissioners of the County of Eagle, State of Colorado; George A. Gates, Johnette Phillips, James E. Johnson, Jr., in their official capacities as individual members of said Board; The Board of County Commissioners of the County of Eagle, in its capacity as the permitting authority under §24-65101 *et seq.*, C.R.S.; The Eagle County Planning Commission; Mark Donaldson, Robert Tether, Arlene Quenon, Robert Morris, Donald Price, in their official capacities as individual members of said commission; The County of Eagle, State of Colorado; Holy Cross Wilderness Defense Fund; and Vail Valley Consolidated Water District,

Respondents.

ANDERSON, GIANUNZIO, DUDE, PIFHER & LEBEL, P.C.

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Colorado Springs, CO 80903
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Attorneys for Petitioners

ISSUES PRESENTED FOR REVIEW

1. Did the Court of Appeals err in allowing a county, under the Colorado Land Use Act, § 24-65.1-101 *et seq.* 10B C.R.S. (1988 & Supp. 1994) (H.B. 1041), to veto a municipal water project located on federal lands?

* * *

3. Did the Court of Appeals err in ruling that Colorado home rule municipalities do not have standing to pursue a claim for the regulatory taking of property without just compensation?

* * *

Finally, even assuming that the actions of the county did not run afoul of Article XX, Section 1, the doctrine of federal preemption does not allow the county to veto a permit of a federally approved project located entirely on federal lands. See *Brubaker v. Board of County Comm'rs*, 652 P.2d 1050, 1059 (Colo. 1982), citing *Andrus v. Click*, 97 Colo. 791, 554 P.2d 969 (1976); *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572 (1987). The Court of Appeals refused to even reach this issue.

* * *

D. THE COURT OF APPEALS ERRED IN RULING THAT COLORADO MUNICIPALITIES DO NOT HAVE STANDING TO PURSUE A CLAIM FOR THE REGULATORY TAKING OF PROPERTY WITHOUT JUST COMPENSATION.

The Court of Appeals found that the cities had no standing under the Fifth and Fourteenth Amendments to

the United States Constitution even though they were operating in their proprietary capacity in the provision of a water supply which they had previously acquired in the open market. The court's decision constitutes a total bar to any regulatory takings claim, the remedy of last resort should the county have the authority to deny the permits necessary to construct the project.[9] In so ruling, the court erroneously relied on dicta in *Orchard City v. Delta County Comm'rs*, 751 P.2d 1003, 1006, n.3 (Colo. 1988). That case, and the precedent cited therein, dealt with the allocation of political authority, including taxation authority, and did not address the taking of property interests.

The very essence of a home rule city is embodied in the constitutional mandate that in its local and municipal affairs the city has full and complete authority. The legislature is powerless to change this essential rule. *Four-County Metropolitan Improvement Dist. v. Board of County Comm'rs*, 149 Colo. 284, 304, 369 P.2d 67 (1962); *City of Thornton*, 194 Colo. at 535 (even though a matter may be of statewide concern, the General Assembly has no power to enact any law that denies a specifically granted constitutional right). Colorado home rule municipalities are not to be treated as mere "political subdivisions" of the state. *Mesa Verde County v. Montezuma County*, 831 P.2d 482, 485 (Colo. 1992).

In situations involving the property interests of municipalities, claims for compensation can indeed be

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[9] It should be reiterated that there were no water court decrees or federal approvals for "alternative" projects, while the county failed to identify what mitigation it might find acceptable under the application before it.

asserted. See I. Julius, et al., Nichols on Eminent Domain §2.225[1], at 2158 (3rd Ed. 1993); Annotation, Condemnation of Public Entities Land, 35 ALR.3d 1293, 1307 (1971); *Worcester v. Worcester Consol. Street R. Co.*, 196 U.S. 539, 551 (1905). The Court of Appeals ignored such precedent and the logic upon which it is based. See also: Case Comment, *Municipal Corporation Standing to Sue the State: Rogers v. Brockette*, 93 Harv. L. Rev. 586, 590-91 (1980); *United States v. Fifty Acres of Land*, 469 U.S. 24 (1984) (reference to "private property" in the takings clause of the Fifth Amendment encompasses the property of state and local governments). Hence, if the county possesses such veto authority, the cities must have recourse to protect their property rights through the assertion of a constitutional takings claim.

* * *

APPENDIX O

Colorado Land Use Act

§ 24-65.1-101. Legislative declaration

(1) In addition to the legislative declaration contained in section 24-65-102(1), the general assembly further finds and declares that:

(a) The protection of the utility, value, and future of all lands within the state, including the public domain as well as privately owned land, is a matter of public interest;

(b) Adequate information on land use and systematic methods of definition, classification, and utilization thereof are either lacking or not readily available to land use decision makers; and

(c) It is the intent of the general assembly that land use, land use planning, and quality of development are matters in which the state has responsibility for the health, welfare, and safety of the people of the state and for the protection of the environment of the state.

(2) It is the purpose of this article that:

(a) The general assembly shall describe areas which may be of state interest and activities which may be of state interest and establish criteria for the administration of such areas and activities;

(b) Local governments shall be encouraged to designate areas and activities of state interest and, after such designation, shall administer such areas and activities of state interest and promulgate guidelines for the administration thereof; and

(c) Appropriate state agencies shall assist local governments to identify, designate, and adopt guidelines for administration of matters of state interest.

(Laws 1974, H.B.1041, § 1.)

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§ 24-65.1-102. General definitions

As used in this article, unless the context otherwise requires:

(1) "Development" means any construction or activity which changes the basic character or the use of the land on which the construction or activity occurs.

(2) "Local government" means a municipality or county.

(3) "Local permit authority" means the governing body of a local government with which an application for development in an area of state interest or for conduct of an activity of state interest must be filed, or the designee thereof.

(4) "Matter of state interest" means an area of state interest or an activity of state interest or both.

(5) "Municipality" means a home rule or statutory city, town, or city and county or a territorial charter city.

(6) "Person" means any individual, partnership, corporation, association, company, or other public or corporate body, including the federal government, and

includes any political subdivision, agency, instrumentality, or corporation of the state.

(Laws 1974, H.B.1041, § 1.)

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§ 24-65.1-105. Effect of article – public utilities

(1) With regard to public utilities, nothing in this article shall be construed as enhancing or diminishing the power and authority of municipalities, counties, or the public utilities commission. Any order, rule, or directive issued by any governmental agency pursuant to this article shall not be inconsistent with or in contravention of any decision, order, or finding of the public utilities commission with respect to public convenience and necessity. The public utilities commission and public utilities shall take into consideration and, when feasible, foster compliance with adopted land use master plans of local governments, regions, and the state.

(2) Nothing in this article shall be construed as enhancing or diminishing the rights and procedures with respect to the power of a public utility to acquire property and rights-of-way by eminent domain to serve public need in the most economical and expedient manner.

(Laws 1974, H.B.1041, § 1.)

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§ 24.65.1-106. Effect of article – rights of property owners – water rights

(1) Nothing in this article shall be construed as:

(a) Enhancing or diminishing the rights of owners of property as provided by the state constitution or the constitution of the United States;

(b) Modifying or amending existing laws or court decrees with respect to the determination and administration of water rights.

(Laws 1974, H.B.1041, § 1.)

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§ 24-65.1-203. Activities of state interest as determined by local governments

(1) Subject to the procedures set forth in part 4 of this article, a local government may designate certain activities of state interest from among the following:

(a) Site selection and construction of major new domestic water and sewage treatment systems and major extension of existing domestic water and sewage treatment systems;

(b) Site selection and development of solid waste disposal sites except those sites specified in section 25-11-203(1), C.R.S., sites designated pursuant to part 3 of article 11 of title 25, C.R.S., and hazardous waste disposal sites, as defined in section 25-15-200.3, C.R.S.;

(c) Site selection of airports;

(d) Site selection of rapid or mass transit terminals, stations, and fixed guideways;

(e) Site selection of arterial highways and interchanges and collector highways;

(f) Site selection and construction of major facilities of a public utility;

(g) Site selection and development of new communities;

(h) Efficient utilization of municipal and industrial water projects; and

(i) Conduct of nuclear detonations.

(Laws 1974, H.B.1041, § 1; Laws 1979, S.B.335, § 9; Laws 1979, H.B.1509, § 2; Laws 1983, S.B.282, § 26.)

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§ 24-65.1-204. Criteria for administration of activities of state interest

(1)(a) New domestic water and sewage treatment systems shall be constructed in areas which will result in the proper utilization of existing treatment plants and the orderly development of domestic water and sewage treatment systems of adjacent communities.

(b) Major extensions of domestic water and sewage treatment systems shall be permitted in those areas in which the anticipated growth and development that may occur as a result of such extension can be accommodated

within the financial and environmental capacity of the area to sustain such growth and development.

(2) Major solid waste disposal sites shall be developed in accordance with sound conservation practices and shall emphasize, where feasible, the recycling of waste materials. Consideration shall be given to longevity and subsequent use of waste disposal sites, soil and wind conditions, the potential problems of pollution inherent in the proposed site, and the impact on adjacent property owners, compared with alternate locations.

(3) Airports shall be located or expanded in a manner which will minimize disruption to the environment of existing communities, minimize the impact on existing community services, and complement the economic and transportation needs of the state and the area.

(4)(a) Rapid or mass transit terminals, stations, or guideways shall be located in conformance with the applicable municipal master plan adopted pursuant to section 31-23-206, C.R.S., or any applicable master plan adopted pursuant to section 30-28-108, C.R.S. If no such master plan has been adopted, such areas shall be developed in a manner designed to minimize congestion in the streets; to secure safety from fire, floodwaters, and other dangers; to promote health and general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; and to facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements. Activities shall be conducted with reasonable consideration, among other things, as to the character of the area and its peculiar suitability for particular uses and

with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout the jurisdiction of the applicable local government.

(b) Proposed locations of rapid or mass transit terminals, stations, and fixed guideways which will not require the demolition of residences or businesses shall be given preferred consideration over competing alternatives.

(c) A proposed location of a rapid or mass transit terminal, station, or fixed guideway that imposes a burden or deprivation on a local government cannot be justified on the basis of local benefit alone, nor shall a permit for such a location be denied sloely [sic] because the location places a burden or deprivation on one local government.

(5) Arterial highways and interchanges and collector highways shall be located so that:

(a) Community traffic needs are met;

(b) Desirable community patterns are not disrupted; and

(c) Direct conflicts with adopted local government, regional, and state master plans are avoided.

(6) Where feasible, major facilities of public utilities shall be located so as to avoid direct conflict with adopted local government, regional, and state master plans.

(7) When applicable, or as may otherwise be provided by law, a new community design shall, at a minimum, provide for transportation, waste disposal, schools,

and other governmental services in a manner that will not overload facilities of existing communities of the region. Priority shall be given to the development of total communities which provide for commercial and industrial activity, as well as residences, and for internal transportation and circulation patterns.

(8) Municipal and industrial water projects shall emphasize the most efficient use of water, including, to the extent permissible under existing law, the recycling and reuse of water. Urban development, population densities, and site layout and design of storm water and sanitation systems shall be accomplished in a manner that will prevent the pollution of aquifer recharge areas.

(9) Nuclear detonations shall be conducted so as to present no material danger to public health and safety. Any danger to property shall not be disproportionate to the benefits to be derived from a detonation.

(Laws 1974, H.B.1041, § 1; Laws 1975, H.B.1089, § 5.)

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§ 24-65.1-301. Functions of local government

(1) Pursuant to this article, it is the function of local government to:

(a) Designate matters of state interest after public hearing, taking into consideration:

(I) The intensity of current and foreseeable development pressures; and

(II) Applicable guidelines for designation issued by the applicable state agencies;

(b) Hold hearings on applications for permits for development in areas of state interest and for activities of state interest;

(c) Grant or deny applications for permits for development in areas of state interest and for activities of state interest;

(d) Receive recommendations from state agencies and other local governments relating to matters of state interest;

(e) Send recommendations to other local governments and the Colorado land use commission relating to matters of state interest; and

(f) Act, upon request of the Colorado land use commission, with regard to specific matters of state interest.

(Laws 1974, H.B.1041, § 1.)

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§ 24-65.1-402. Guidelines – regulations

(1) The local government shall develop guidelines for administration of the designated matters of state interest. The content of such guidelines shall be such as to facilitate administration of matters of state interest consistent with sections 24-65.1-202 and 24-65.1-204.

(2) A local government may adopt regulations interpreting and applying its adopted guidelines in relation to

specific developments in areas of state interest and to specific activities of state interest.

(3) No provision in this article shall be construed as prohibiting a local government from adopting guidelines or regulations containing requirements which are more stringent than the requirements of the criteria listed in sections 24-65.1-202 and 24-65.1-204.

(Laws 1974, H.B.1041, § 1.)

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§ 214-65.1-502. Judicial review

The denial of a permit by a local government agency shall be subject to judicial review in the district court for the judicial district in which the major development or activity is to occur.

(Laws 1974, H.B.1041, § 1.)

APPENDIX P

Eagle County Land Use Regulations

EAGLE COUNTY REGULATIONS

CHAPTER 6

AREAS AND ACTIVITIES OF STATE INTEREST

6.01 ADMINISTRATIVE REGULATIONS

INTRODUCTORY AND GENERAL PROVISIONS

6.01.01 Title and Citation

1) These various sections and subsections that are organized into a comprehensive set of regulations are entitled and may be cited as the "Guidelines and Regulations for Areas and Activities of State Interest of the County of Eagle, State of Colorado."

2) This Section 6.01 is entitled and may be cited as the "Administrative Regulations."

6.01.02 Purpose and Findings

1) The purpose of these Regulations is to facilitate identification, designation, and administration of matters of State interest consistent with the statutory requirements and criteria set forth in Section 24-65.1-101, *et seq.*, C.R.S., and Guidelines for Identification and Designation approved by the Colorado Land Use Commission.

2) The Board of County Commissioners, County of Eagle, State of Colorado, finds that:

a) The notice and public hearing requirements of Section 24-65.1-404, C.R.S., have been followed;

b) These regulations are necessary because of the intensity of current and foreseeable development pressures on and within the County of Eagle;

c) These regulations were adopted after taking into consideration applicable guidelines adopted and issued by the Colorado Land Use Commission;

d) These regulations apply to the entire unincorporated territory of the County of Eagle;

* * *

6.03 SITE SELECTION AND CONSTRUCTION OF MAJOR NEW DOMESTIC WATER AND SEWAGE TREATMENT SYSTEMS

GENERAL AND INTRODUCTORY PROVISIONS

6.03.01 Title and Citation

These various sections constituting Section 6.03 of the "Guidelines and Regulations of Areas and Activities of State Interest of the County of Eagle, State of

Colorado," may be cited as the "Regulations for Site Selection and Construction of Major New Domestic Water and Sewage Treatment Systems" of Eagle County.

6.03.02 Purpose and Intent

The purpose and intent of the regulations contained in this Section are as follows:

1) To insure that new domestic water and sewage treatment systems are constructed in areas which will result in the proper utilization of existing treatment plants and the orderly development of Domestic water and sewage treatment systems within this County;

2) To insure that site selection and construction of major new domestic water and sewage treatment systems are conducted in such a manner as to minimize environmental impacts associated with such development;

3) To insure that site selection and construction of major new domestic water and sewage treatment systems are planned and developed in a manner so as not to impose an undue economic burden on existing or proposed communities within this County;

4) To insure that urban development, population densities, and site layout and design of water, wastewater, storm water and sanitation systems

shall be accomplished in a manner that will prevent the pollution of aquifer recharge areas;

5) To insure that the off-site impacts of such projects are effectively mitigated.

* * *

6.04.04 Waiver of Submission Requirements

1) The Permit Authority may waive any part but not all of the submission requirements imposed by this Regulation upon petition of the applicant that full compliance with the submission requirements would be unreasonably burdensome for the applicant and that the proposed development will have an insubstantial impact on the surrounding area. In cases in which the development or activity must also comply with PUD and/or subdivision regulations, the permit hearing required by these regulations should be held at the same time as the preliminary plat hearing. Such a waiver of submission requirements may be granted, after due consideration by the Permit Authority, upon a written determination that the information to be submitted is sufficient for the Permit Authority to arrive at a permit decision in full compliance with the law and these Regulations and

that the proposed development will have an insubstantial impact on the surrounding area.

2) The petition shall be considered and the decision rendered by the Permit Authority at a public hearing held in substantial compliance with the provisions of Subsection 6.01.25 of the Administrative Regulations adopted by this jurisdiction.

3) In the event the waiver request is denied, the applicant shall provide the required additional information on or before five (5) days prior to the date set for hearing of the application itself. If the applicant fails to provide such information, the Permit Authority may in its discretion vacate the public hearing on the application itself and require complete reapplication, or may continue the hearing in accordance with Subsection 6.01.26(a).

6.03.15 Approval of Permit Application

Amended by Resolution No. 84-20 Dated: 5/9/84

1) A permit application for site selection and construction of a major new domestic water or sewage treatment system shall be approved, with reasonable conditions, if any, in the discretion of the Permit Authority, if the proposed development complies with the following criteria:

a) New domestic water and sewage treatment systems shall be constructed in areas which will

result in the proper utilization of existing treatment plants and the orderly development of domestic water and sewage treatment systems of communities within this County within the development area and source development area;

b) The proposed development does not conflict with an approved local master plan or other applicable regional, state or federal land use or water plan;

c) The proposed development does not adversely affect either surface or subsurface water rights of upstream or downstream users;

d) Adequate water supplies, as determined by the Colorado Department of Health, are available for efficient operational needs;

e) Existing domestic water treatment systems servicing the area must be at or near operational capacity;

f) Existing domestic sewage treatment facilities servicing the area must be at or greater than eighty per cent (80%) of operational capacity;

g) The scope and nature of the proposed development will not compete with existing water and

sewage services or create duplicative services;

h) Age of existing water and sewage systems, operational efficiency, state of repair or level of treatment is such that replacement is warranted;

i) Area and community development and population trends demonstrate clearly a need for such development;

j) Existing facilities cannot be upgraded or expanded to meet waste discharge permit conditions of the Colorado Water Quality Control Division.

k) Appropriate easements can be obtained for any associated collector or distribution system that will serve existing and proposed needs;

l) The benefits of the proposed development outweigh the losses of any natural resources or agricultural lands rendered unavailable as a result of the proposed development;

m) The proposed development will not decrease the quality of peripheral or downstream surface or subsurface water resources below that designated by the Colorado Water Quality Control Commission as established on May 22, 1979, and

effective July 10, 1979, or more stringent standards subsequently adopted;

n) The proposed development or its associated collector or distribution system or new service areas will not violate federal or state air quality standards;

o) The proposed development or its associated collector or distribution system will not significantly deteriorate aquatic habitats, marshlands and wetlands, groundwater recharge areas, steeply sloping or unstable terrain, forests and woodlands, critical wildlife habitat, big game migratory routes, calving grounds, migratory ponds, nesting areas and the habitats of rare and endangered species, public outdoor recreation areas, and unique areas of geologic, historic, or archaeological importance;

p) The proposed development or its associated collector or distribution system will not significantly degrade existing natural scenic characteristics, create blight, nor cause other nuisance factors such as excessive noise or obnoxious odors;

q) The proposed development or its associated collector or distribution system will not create an

undue financial burden on existing or future residents within the development area and the source development area. The cost of securing an adequate supply of water for existing and future needs of the residents of the County shall be considered in determining whether an "undue financial burden" will result;

r) The salinity and advanced wastewater treatment offset plans required by Subsections 6.03.13(7)(b)(6) and 6.03.13(8)(e) have been approved by the Permit Athority [sic] and required fees associated therewith, if any, have been paid.

s) The construction of structures, buildings and improvements associated with the proposed development will not significantly impact existing or proposed communities within the development area and source development area.

Amended by Resolution No. 84-20 Dated: 5/9/84

t) The development site of a major new domestic water or sewage treatment system is not subject to significant risk from earthquakes, floods, fires, snowslides, landslides, avalanches, rockslides or other disasters which could cause a system operational breakdown.

2) The permit shall be denied if the applicant fails to satisfy all the criteria outlined in 6.03.15(1).

ADMINISTRATION, ENFORCEMENT AND PENALTIES

6.03.16 Administration, Enforcement and Penalties

* * *

submitted is sufficient for the Permit Authority to arrive at a permit decision in full compliance with the law and these regulations and that the proposed development will have an insubstantial impact on the surrounding area.

2) The petition shall be considered and the decision rendered by the Permit Authority at a public hearing held in substantial compliance with the provisions of Subsection 6.01.25 of the Administrative Regulations adopted by this jurisdiction.

3) In the event the waiver request is denied, the applicant shall provide the required additional information on or before five (5) days prior to the date set for hearing of the application itself. If the applicant fails to provide such information, the Permit Authority may in its discretion vacate the public hearing on the application itself and require complete reapplication, or may continue the hearing in accordance with Subsection 6.01.26(1).

6.04.15 Approval of Permit Application

Amended by Resolution No. 84020 Dated: 5/9/84

1) A permit application for a major extension of existing domestic water or sewage treatment system shall be approved, with reasonable conditions, if any, in the discretion of the Permit Authority, if the proposed development complies with the following criteria:

   a) Major extensions of domestic water and sewage treatment systems shall be permitted in those areas in which the anticipated growth and development that may occur as a result of such extension can be accommodated within the financial and environmental capacity of the development area and source development area to sustain such growth and development;

   b) The proposed development does not conflict with an approved local master plan or other applicable regional, state or federal land use or water plan;

   c) The proposed development does not adversely affect either surface or sub-surface water rights of upstream or downstream users within the development area and source development area;

   d) Adequate water supplies as determined by the Colorado

Department of Health are available for efficient operational needs;

e) Existing domestic water treatment systems servicing the area must be at or near operational capacity;

f) Existing domestic sewage treatment facilities servicing the area must be at or greater than eighty per cent (80%) of operational capacity;

g) The scope and nature of the proposed development will not compete with existing water and sewage services or create duplicate services;

h) Age of existing water and sewage systems, operational efficiency, state of repair, or level of treatment is such that replacement is warranted;

i) Area and community development and population trends demonstrate clearly a need for such development;

j) Existing facilities cannot be upgraded or expanded to meet waste discharge permit conditions of the Colorado Water Quality Control Commission;

k) Appropriate easements can be obtained for any associated collector or distribution system that

will serve existing and proposed needs;

l) The benefits of the proposed development outweigh the losses of any natural resources or agricultural lands rendered unavailable as a result of the proposed development;

m) The proposed development will not decrease the quality of peripheral or downstream surface or subsurface water resources below that designated by the Colorado Water Quality Control Commission as established on May 22, 1979, and effective July 10, 1979, or more stringent standards

* * *

6.05.15 Approval of Permit Application.

Amended by Resolution NO. 84-20 Dated: 5/9/84

(1) A permit application for development of a municipal or industrial water project shall be approved, with reasonable conditions, if any, in the discretion of the Permit Authority, if the proposed development complies with the following criteria:

a) The need for the proposed water project can be substantiated;

b) Assurances of compatibility of the proposed water project with federal, state, regional and County planning policies regarding land use and water resources;

c) Municipal and industrial water projects shall emphasize the most efficient use of water, including, to the extent permissible under existing law, the recycling and reuse of water. Urban development, population densities, and site layout and design of stormwater and sanitation systems shall be accomplished in a manner that will prevent the pollution of aquifer recharge areas;

d) Provisions to insure that the proposed water project will not contaminate surface water resources;

e) The proposed water project is capable of providing water pursuant to standards of the Colorado Department of Health;

f) The proposed diversion of water from the source development area will not decrease the quality of peripheral or downstream surface and subsurface water resources in the source development area below that designated by the Colorado Water Quality Control Division on May 22, 1979, and effective July 10, 1979, or more stringent standards subsequently adopted;

g) The proposed development and the potential diversions of water from the source development area will not significantly deteriorate aquatic habitats, marshlands and wetlands, groundwater recharge areas, steeply sloping or unstable terrain, forests and woodlands, critical wildlife habitats, big game migratory routes, calving grounds, migratory ponds, nesting areas and the habitats of rare and endangered species, public outdoor recreational areas, and unique areas of geologic, historic or archaeological importance;

h) The salinity and advanced wastewater treatment offset plans required by Subsections 6.05.13(16) and (17) have been approved by the Permit Authority and required fees associated therewith, if any, have been paid;

i) The construction of structures, buildings, and improvements associated with the proposed development will not significantly impact existing or proposed communities within the development area and source development area.

* * *

APPENDIX Q

Federal Land Policy Management Act
43 U.S.C. §§ 1700-1784

43 U.S.C. § 1701. Congressional declaration of policy

(a) The Congress declares that it is the policy of the United States that – . . .

(7) goals and objectives be established by law as guidelines for public land use planning, and that management be on the basis of multiple use and sustained yield unless otherwise specified by law;

(8) The public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archaeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use;

* * *

(12) the public lands be managed in a manner which recognizes the Nation's need for domestic sources of minerals, food, timber, and fiber from the public lands including implementation of the Mining and Minerals Policy Act of 1970 (84 Stat. 1876, 30 U.S.C. 21a) as it pertains to the public lands;

* * *

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43 U.S.C. § 1712. Land use plans

* * *

(c) (9) to the extent consistent with the laws governing the administration of the public lands, coordinate the land use inventory, planning, and management activities of or for such lands with the land use planning and management programs of other federal departments and agencies and of the States and local governments within which the lands are located, including, but not limited to, the statewide outdoor recreation plans developed under the Act of September 3, 1964 (78 Stat. 897), as amended [16 U.S.C.A. § 460*l*-4 et seq.], and of or for Indian tribes by, among other things, considering the policies of approved state and tribal land resource management programs. In implementing this directive, the Secretary shall, to the extent he finds practical, keep apprised of State, local, and tribal land use plans; assure that consideration is given to those State, local, and tribal plans that are germane in the development of land use plans for public lands; assist in resolving, to the extent practical, inconsistencies between Federal and non-Federal Government plans, and shall provide for meaningful public involvement of State and local government officials, both elected and appointed, in the development of land use programs, land use regulations, and land use decisions for public lands, including early public notice of proposed decisions which may have a significant impact on non-Federal lands. Such officials in each State are authorized to furnish advice to the Secretary with respect to the development and revision of land use plans, land use guidelines, land use rules, and land use regulations for the public

lands within such State and with respect to such other land use matters as may be referred to them by him. Land use plans of the Secretary under this section shall be consistent with State and local plans to the maximum extent he finds consistent with Federal law and the purposes of this Act.

* * *

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43 U.S.C. § 1732. Management of use, occupancy, and development of public lands

(a) Multiple use and sustained yield requirements applicable; exception

The Secretary shall manage the public lands under principles of multiple use and sustained yield, in accordance with the land use plans developed by him under section 1712 of this title when they are available, except that where a tract of such public land has been dedicated to specific uses according to any other provisions of law it shall be managed in accordance with such law.

(b) Easements, permits, etc., for utilization through habitation, cultivation, and development of small trade or manufacturing concerns; applicable statutory requirements

In managing the public lands, the Secretary shall, subject to this Act and other applicable law and under such terms and conditions as are consistent with such

law, regulate, through easements, permits, leases, licenses, published rules, or other instruments as the Secretary deems appropriate, the use, occupancy, and development of the public lands, including, but not limited to, long-term leases to permit individuals to utilize public lands for habitation, cultivation, and the development of small trade or manufacturing concerns: . . .

* * *

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43 U.S.C. § 1761. Grant, issue, or renewal of rights-of-way; authorized purposes; procedures applicable

* * *

(a) The Secretary, with respect to the public lands . . . and, the Secretary of Agriculture, with respect to lands within the National Forest System (except in each case land designated as wilderness), are authorized to grant, issue, or renew rights-of-way over, upon, under, or through such lands for –

(1) reservoirs, canals, ditches, flumes, laterals, pipes, pipelines, tunnels, and other facilities and systems for the impoundment, storage, transportation, or distribution of water;

* * *

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43 U.S.C. § 1765. Terms and conditions

Each right-of-way shall contain –

(a) terms and conditions which will (i) carry out the purposes of this Act and rules and regulations issued thereunder; (ii) minimize damage to scenic and esthetic values and fish and wildlife habitat and otherwise protect the environment; (iii) require compliance with applicable air and water quality standards established by or pursuant to applicable Federal or State law; and (iv) require compliance with State standards for public health and safety environmental protection, and siting, construction, operation, and maintenance of or for rights-of-way for similar purposes if those standards are more stringent than applicable Federal standards. . . .

* * *

APPENDIX R

National Forest Management Act
16 U.S.C. §§ 1600-1614

16 U.S.C. § 1600. Congressional findings

The Congress finds that –

(1) the management of the Nation's renewable resources is highly complex and the uses, demand for, and supply of the various resources are subject to change over time;

(2) the public interest is served by the Forest Service, Department of Agriculture, in cooperation with other agencies, assessing the Nation's renewable resources, and developing and preparing a national renewable resource program, which is periodically reviewed and updated;

(3) to serve the national interest, the renewable resource program must be based on a comprehensive assessment of present and anticipated uses, demand for, and supply of renewable resources from the Nation's public and private forests and rangelands, through analysis of environmental and economic impacts, coordination of multiple use and sustained yield opportunities as provided in the Multiple-Use Sustained-Yield Act of 1960 (74 Stat. 215; 16 U.S.C. 528-531), and public participation in the development of the program;

* * *

16 U.S.C. § 1604. National Forest System land and resource management plans

* * *

(e) Required assurances

In developing, maintaining, and revising plans for units of the National Forest System pursuant to this section, the Secretary shall assure that such plans –

(1) provide for multiple use and sustained yield of the products and services obtained therefrom in accordance with the Multiple-Use Sustained-Yield Act of 1960 [16 U.S.C.A. §§ 528-531], and, in particular, include coordination of outdoor recreation, range, timber, watershed, wildlife and fish, and wilderness; and

(2) determine forest management systems, harvesting levels, and procedures in the light of all of the uses set forth in subsection (c)(1) of this section, the definition of the terms "multiple use" and "sustained yield" as provided in the Multiple-Use Sustained-Yield Act of 1960, and the availability of lands and their suitability for resource management.

* * *

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16 U.S.C. § 1612. Public participation

(a) Adequate notice and opportunity to comment

In exercising his authorities under this subchapter and other laws applicable to the Forest Service, the Secretary, by regulation, shall establish procedures, including public hearings where appropriate, to give the Federal, State, and local governments and the public adequate notice and an opportunity to comment upon the formulation of standards, criteria, and guidelines applicable to Forest Service programs.

* * *

APPENDIX S

Organic Act of 1897
16 U.S.C. §§ 475-481

16 U.S.C. § 475. Purposes for which national forests may be established and administered

All public lands designated and reserved prior to June 4, 1897, by the President of the United States under the provisions of section 471 of this title, the orders for which shall be and remain in full force and effect, unsuspended and unrevoked, and all public lands that may hereafter be set aside and reserved as national forests under said section, shall be as far as practicable controlled and administered in accordance with the following provisions. No national forest shall be established, except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States; but it is not the purpose or intent of these provisions, or of said section, to authorize the inclusion therein of lands more valuable for the mineral therein, or for agricultural purposes, than for forest purposes.

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16 U.S.C. § 481. Use of waters

All waters within the boundaries of national forests may be used for domestic, mining, milling, or irrigation purposes, under the laws of the State wherein such

national forests are situated, or under the laws of the United States and the rules and regulations established thereunder.

APPENDIX T

Multiple Use and Sustained Yield Act
16 U.S.C. §§ 528-531

16 U.S.C. § 528. Development and administration of renewable surface resources for multiple use and sustained yield of products and services; congressional declaration of policy and purpose

It is the policy of the Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes. The purposes of sections 528 to 531 of this title are declared to be supplemental to, but not in derogation of, the purposes for which the national forests were established as set forth in section 475 of this title. Nothing herein shall be construed as affecting the jurisdiction or responsibilities of the several States with respect to wildlife and fish on the national forests. Nothing herein shall be construed so as to affect the use or administration of the mineral resources of national forest lands or to affect the use or administration of Federal lands not within national forests.

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16 U.S.C. § 530. Cooperation for purposes of development and administration with State and local governmental agencies and others

In the effectuation of sections 528 to 531 of this title and the Secretary of Agriculture is authorized to cooperate with interested State and local governmental agencies and others in the development and management of the national forests.

APPENDIX U

Property Clause

U.S. Const. Article IV, § 3, cl. 2

* * *

Power of congress over territories. The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

* * *

APPENDIX V

U.S. Const. AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. AMENDMENT XIV

SECTION. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION. 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each

State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but

all such debts, obligations and claims shall be held illegal and void.

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

APPENDIX W

Supremacy Clause

U.S. Const. Article VI, cl. 2

* * *

Supremacy of constitution, treaties and laws. This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

APPENDIX X

Public Law 96-560, 94 Stat. 3265 (1980)

* * *

(5) certain lands in San Isabel and White River National Forests, Colorado, which comprise approximately one hundred and twenty-six thousand acres, as generally depicted on a map entitled "Holy Cross Wilderness – Proposed", dated November 1980, and which shall be known as the Holy Cross Wilderness: *Provided*, That no right, or claim of right, to the diversion and use of existing conditional water rights for the Homestake Water Development project by the cities of Aurora and Colorado Springs shall be prejudiced, expanded, diminished, altered, or affected by this Act. Nothing in this Act shall be construed to expand, abate, impair, impede, or interfere with the construction, maintenance or repair of said project, nor the operation thereof, or any exchange or modification of the same agreed to by the cities and the United States, acting through any appropriate agency thereof;

* * *

APPENDIX Y

Code of Federal Regulation
36 C.F.R. Pt. 200-299

36 C.F.R. § 219.6 Public participation.

(a) Because the land and resource management planning process determines how the lands of the National Forest System are to be managed, the public is encouraged to participate throughout the planning process. the intent of public participation is to –

(1) Broaden the information based upon which land and resource management planning decisions are made;

(2) Ensure that the Forest Service understands the needs, concerns, and values of the public;

(3) Inform the public of Forest Service land and resource planning activities; and

(4) Provide the public with an understanding of Forest Service programs and proposed actions.

* * *

(c) Public participation activities, as deemed appropriate by the responsible line officer, shall be used early and often throughout the development of plans . . .

* * *

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36 C.F.R. § 219.7 Coordination with other public planning efforts.

(a) The responsible line officer shall coordinate regional and forest planning with the equivalent and related planning efforts of other Federal agencies. State and local governments, and Indian tribes.

* * *

(c) The responsible line officer shall review the planning and land use policies of other Federal agencies. State and local governments, and Indian tribes . . .

The review shall include –

(1) Consideration of the objectives of other Federal, State and local governments, and Indians tribes, as expressed in their plans and policies:

(2) An assessment of the interrelated impacts of these plans and policies:

(3) A determination of how each Forest Service plan should deal with the impacts identified; and,

(4) Where conflicts with Forest Service planning are identified, consideration of alternatives for their resolution.

(d) In developing land and resource management plans, the responsible line officer shall meet with the designated State official (or designee) and representatives of other Federal agencies, local governments, and Indian tribal governments at the beginning of the planning process to develop procedures for coordination. As a minimum, such conferences shall also be held after public

issues and management concerns have been identified and prior to recommending the preferred alternative. Such conferences may be held in conjunction with other public participation activities, if the opportunity for government officials to participate in the planning process is not thereby reduced.

(e) In developing the forest plan, the responsible line officer shall seek input from other Federal, State and local governments, and universities to help resolve management concerns in the planning process and to identify areas where additional research is needed. This input should be included in the discussion of the research needs of the designated forest planning area.

(f) A program of monitoring and evaluation shall be conducted that includes consideration of the effects of National Forest management on land, resources, and communities adjacent to or near the National Forest being planned and the effects upon National Forest management of activities on nearby lands managed by other Federal or other government agencies or under the jurisdiction of local governments.

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36 C.F.R. § 219.8 Regional planning procedure.

(b) *Responsibilities* – (1) *Chief, Forest Service.* The Chief shall establish agency-wide policy for regional planning and approve all regional guides.

(2) *Regional Forester.* The Regional Forester has overall responsibility for preparing and implementing the regional guide and for preparing the environmental impact statement for proposed standards and guidelines in the regional guide. The Regional Forester appoints and supervises the interdisciplinary team.

* * *

(d) *Guide approval.* The Chief shall review the proposed guide and the final environmental impact statement and either approve or disapprove the guide.

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36 C.F.R. § 219.10 Forest planning – general procedure.

(a) *Responsibilities* – (1) *Regional Forester.* The Regional Forester shall establish regional policy for forest planning and approve all forest plans in the region.

(2) *Forest Supervisor.* The Forest Supervisor has overall responsibility for the preparation and implementation of the forest plan and preparation of the environmental impact statement for the forest plan. The Forest Supervisor appoints and supervises the interdisciplinary team.

* * *

(c) *Plan approval.* The Regional Forester shall review the proposed plan and the final environmental impact statement and either approve or disapprove the plan.

* * *

(d) *Public appeal of approval decision.* The provisions of 36 CFR Part 211, Subpart B apply to any administrative appeal of the Regional Forester's decision to approve a forest plan. Decisions to disapprove a plan and other decisions made during the forest planning process prior to the issuance of a record of decision approving the plan are not subject to administrative appeal.

* * *

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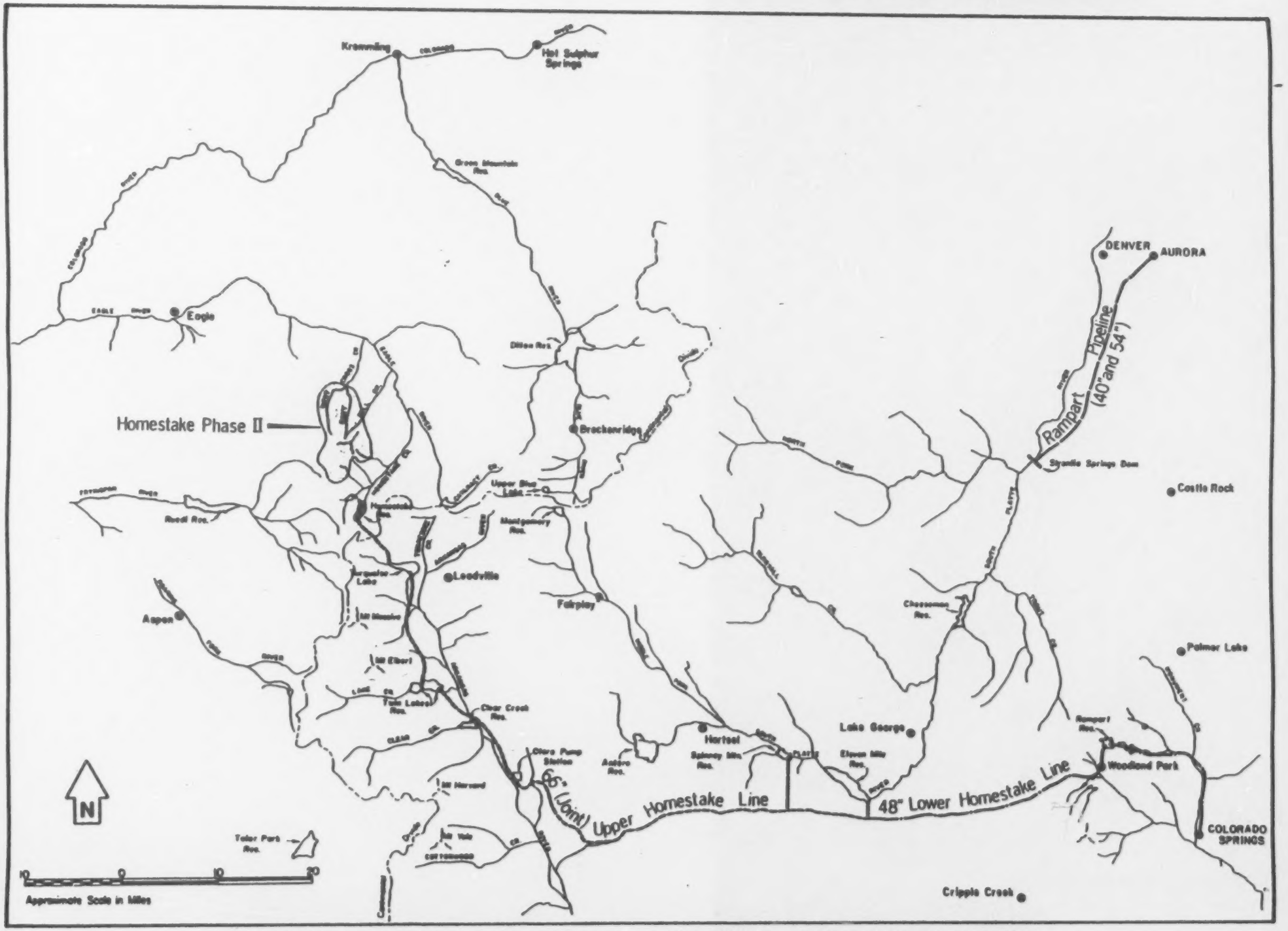

FIGURE 1-3 AURORA AND COLORADO SPRINGS WATER DELIVERY SYSTEMS